(33,828)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 519

WESTERN & ATLANTIC RAILROAD, APPELLANT,

vs.

MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

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[fol. 1] **IN SUPREME COURT OF GEORGIA, AT ATLANTA**

WESTERN & ATLANTIC RAILROAD, Appellant

versus

MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY, Appellees

PETITION FOR APPEAL AND SUPERSEDEAS—Filed Oct. 5, 1928

Now comes the Western & Atlantic Railroad, appellant in this case, which was No. 6022 in the Supreme Court of the State of Georgia, and says that on September 15, 1928, the Supreme Court of the State of Georgia, it being the highest court of said State in which a decision could be had, in the said cause between the above named parties, entered a final judgment therein in favor of the plaintiffs below, appellees here, and against the Western & Atlantic Railroad, in which final judgment in said cause certain errors were committed to the prejudice of the Western & Atlantic Railroad, appellant herein, all of which will more in detail appear from the assignment of errors which is filed with this petition. That in the record and proceedings it will appear that there was drawn into question the validity of a statute of the State of Georgia, towit; Section 2780 of the Civil Code of 1910, on the ground that said statute offended both the due process of law and the equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States, all of which is fully apparent in the record and proceedings in said cause and specifically set forth in the assignment of errors filed herewith.

Wherefore the appellant, the Western & Atlantic Rail-
[fol. 2] road, prays that upon execution by it of a proper bond, duly approved, an appeal may be granted in its behalf in said cause for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in said case, duly authenticated, may be sent to the Supreme Court of the United States at Washington.

The Western & Atlantic Railroad, appellant, desiring to supersede execution on the judgment rendered against it

in this cause, here tenders bond in such sum as the Court may require for such purpose, and prays that, with the allowance of the appeal, a supersedeas may issue.

This October 5th, 1928.

Western & Atlantic Railroad, by Fitzgerald Hall, Vice-President & General Counsel. Tye, Thompson and Tye, Division Counsel.

Appeal and supersedeas is hereby allowed as prayed upon the Western & Atlantic Railroad giving bond as required by law in the sum of Thirty Thousand Dollars.

This 5th day of October, 1928.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 3] In Supreme Court of Georgia

[Title omitted]

Order Allowing Appeal and Supersedeas—Filed Oct. 5, 1928

This cause came on to be heard upon the petition of the Western & Atlantic Railroad for an appeal and supersedeas to the end that this cause may be transferred as provided by law to the Supreme Court of the United States for a final determination and that the final judgment entered in this case may be superseded pending such final determination.

And it appearing to the Court that the Western & Atlantic Railroad has in proper manner challenged the validity of a statute of the State of Georgia on the ground that the same is repugnant to the Constitution of the United States and this Court having found by an opinion filed September 15, 1928 that said statute was valid and enforceable, and the Western & Atlantic Railroad having filed a bond in the sum of Thirty Thousand Dollars, satisfactory to the Chief Justice of this Court,

It is, therefore, ordered, adjudged and decreed that an appeal as prayed be, and the same hereby is, allowed, the same to operate as a supersedeas in said cause.

It is further ordered that a transcript of the record, proceedings and papers and original exhibits, duly authenticated, be sent to the Supreme Court of the United States at Washington in the manner provided by law to the end that said Court may inspect the same and do what according to law should be done.

[fol. 4] October 5th, 1928.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 5] Citation, in usual form, showing service on Wm. E. Mann & J. A. McFarland, filed October 8, 1928, omitted in printing.

[fol. 6] IN SUPREME COURT OF GEORGIA

[Title omitted]

ASSIGNMENTS OF ERRORS—Filed Oct. 5, 1928

The Western & Atlantic Railroad, appellant, in connection with its petition for an appeal this day filed, towit: October 5th, 1928, assigns the following errors which it avers occurred in the proceedings in this cause and on the trial thereof and in the opinion and judgment of the Supreme Court of Georgia, upon which it relies to reverse said judgment entered herein as appears of record:

I

The Supreme Court of the State of Georgia erred in holding that Section 2780 of the Civil Code of Georgia, which is in words and figures as follows:

"A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it

appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

constitutional because it offends the due process of law and equal protection of the law clauses of the Constitution of the United States in that as construed and applied by the [fol. 7] Supreme Court of the State of Georgia,

1. It permits a party plaintiff to recover without proving a single averment of negligence.

2. It does not create a mere rule of evidence. It does not simply require a railroad to explain matters peculiarly within its knowledge. But, on mere proof of the fact of collision with a train, it permits every averment of negligence in a plaintiff's petition, regardless of what it is, no matter how many and how fanciful, without an iota of proof to support them, to be considered as substantive evidence to be weighed by a jury against actual proof by witnesses.

3. Its scope is not limited to those in privity of contract with a railroad but applies to all persons whomsoever.

4. It permits recovery on mere proof of collision without any evidence as to proximate cause.

5. The presumption created is not a reasonable, rational and rebuttable one but actually constitutes substantive evidence.

6. The Statute as construed creates a rule of liability, not of evidence.

7. It invidiously discriminates against railroads in two particulars:

(a) In every class of suit sounding in tort in Georgia a party plaintiff is required to prove that some averment of negligence set forth in his petition constituted the proximate cause of the accident for which suit is brought. But this Statute takes railroads out of that general and reasonable rule and permits recovery against railroads without any proof of proximate cause.

(b) In every class of suit in Georgia unproven averments of a plaintiff's petition are, as a matter of law, abandoned

except in suits against railroads. This Statute permits a [fol. 8] jury to consider and make it the basis of a verdict against a railroad—the unproven averment of a plaintiff's petition.

II

The Supreme Court of Georgia erred in overruling the Railway's seventh ground of its assignment of errors, in that court, which is in words and figures as follows:

"The trial Court charged the jury as follows:

'I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employes were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employes exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be entitled to recover.'

"The Court of Appeals held and decided that the Code Section in question (Civil Code of 1910, Section 2780) had uniformly and repeatedly been construed by the Court of Appeals and by the Supreme Court exactly as it was construed by the trial Judge; that it was obvious from admissions of counsel for plaintiff in error that this was true, and that the said counsel also contended that the Statute itself (Code Section 2780) was in violation of the Fourteenth Amendment to the Constitution of the United States; that it was thus obvious that the Statute itself was the primary object of attack, and such an attack could not properly be made in a motion for new trial, as 'A constitutional question can not be raised for the first time in a motion for new trial.'

"Your petitioner respectfully contends that in so ruling and deciding the Court of Appeals committed error; that it was error to decide that a constitutional question can not be raised for the first time in a motion for new trial."

"Your petitioner respectfully contends, as it contended in its assignments of error in ground numbered 18 of the amendment to its motion for new trial, that the quoted

charge was error in that it required the railroad company, when it was shown by plaintiff that injury or damage had been sustained by the operation of its engine and cars, to by evidence disprove every averment of negligence in plaintiff's petition, however, fanciful such averment may be or however unsupported it may be by evidence."

"Also, that said charge was error because it puts upon defendant the necessity and cost of obtaining attendance of witnesses, or other evidence, to sustain the burden of disproving mere allegations of negligence which plaintiff has introduced no evidence to support and may never have intended to endeavor to support by evidence; so that, without any evidence for plaintiff, except of injury or damage by operation of the locomotive and cars, defendant must suffer a finding against it of negligence as to every imputation [fol. 9] thereof in plaintiff's petition, unless it produces disproof of every such imputation, however lacking in proof of such imputation, on the part of plaintiff."

"Also, that the burden as placed upon it, by said charge, was unjust and the charge was violative of the Fourteenth Amendment of the Constitution of the United States, providing: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, in that the said charge as so given tended to deprive movant of its property without due process of law, by subjecting defendant to the burden of disproving every accusation of negligence made against it in the petition of plaintiff, simply upon proof by plaintiff that deceased was killed by the running of one of defendant's locomotives and trains."

"Also, that if the language of the Statute of Georgia (Code of Georgia, 1910, Section 2780), can properly be construed and applied as it was construed and applied in said quoted charge, the said Statute was unconstitutional, because it is in conflict with the said above quoted provision of said Fourteenth Amendment, because, as so construed and applied, said Statute tended to deprive movant of its property without due process of law, by subjecting it to the burden of disproving every allegation of negligence in plaintiff's petition, simply upon proof by plaintiff that decedent was killed by the running of one of defendant's locomotives and trains."

"Your petitioner respectfully contends that the said ruling and decision of the Court of Appeals was error for the reasons hereinabove stated. That it was error for the said Court of Appeals to hold and decide, as it did, that the attack upon the constitutionality of the Statute embodied in said Section 2780, could not be made in a motion for new trial. Also, that said Court erred in not granting a new trial upon said ground numbered 18 of said amendment *fo* the motion for new trial, or, the determination of said constitutional question being necessary to a determination of the cause, in not transferring to this Honorable Court the said cause for determination."

"Your petitioner respectfully contends and submits that errors were committed by the Court of Appeals as above stated; that said errors were material and involved questions manifestly of gravity and importance, and especially as to the questions made in ground numbered 18 of the amendment to the motion for new trial, and as to the constitutionality of the Statute embodied in Section 2780 of the Code of Georgia of 1910, as construed and applied by the Court."

(R., —.)

For which errors, the appellant, the Western & Atlantic Railroad, prays that the said judgment of the Supreme Court of the State of Georgia, dated September 15, 1928, in the above entitled cause, be reversed and that appellees be taxed with the costs.

Western & Atlantic Railroad, by Fitzgerald Hall, Vice-President & General Counsel. Tye, Thompson & Tye, Division Counsel.

October 5th, 1928.

[File endorsement omitted.]

[fol. 10] IN SUPREME COURT OF GEORGIA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Oct. 8, 1928

To the Clerk of the Supreme Court of the State of Georgia:

You are requested by the appellant, the Western & Atlantic Railroad, to incorporate in the record in the above styled case, to be filed in the Supreme Court of the United States pursuant to the appeal allowed in the above entitled cause upon petition of the Western & Atlantic Railroad, the following:

1. Petition for appeal and supersedeas with endorsements thereon.

2. Assignment of errors accompanying petition for appeal.

3. Copy of appeal and supersedeas bond with endorsement thereon.

4. Order allowing appeal and supersedeas.

5. Citation, with acknowledgement of service thereon.

6. Petition to the Supreme Court of Georgia for a writ of certiorari and assignment of errors accompanying same.

7. Order and judgment of the Supreme Court of Georgia granting writ of certiorari, July 6, 1927.

8. Opinion and final judgment of the Supreme Court of the State of Georgia, affirming the opinion of the Court of [fol. 11] Appeals, the same having been filed and entered September 15, 1928.

9. The original petition of Mary E. Henderson, plaintiff in said case, and amendment to said petition.

10. The answer of the defendant to plaintiff's petition, and amendment thereto.

11. The original intervening petition of Maryland Casualty Company filed in said case on April 4, 1925.

12. Defendant's response to said intervening petition of Maryland Casualty Company.

13. Order of the Court granted April 18, 1925, allowing Maryland Casualty Company to intervene in said case and making it a party plaintiff therein.

14. Maryland Casualty Company's amendment to its intervening petition, said amendment allowed and filed on October 12, 1925, and also amendment allowed October 12, 1926.

15. Verdict of jury in said case dated October 13, 1926.

16. Judgment signed in said case on October 13, 1926.

17. The original motion for new trial in said case filed by Western & Atlantic Railroad, and the acknowledgement of service thereon by counsel for said Mary E. Henderson and Maryland Casualty Co.

18. The amendment of Western & Atlantic Railroad to said motion for new trial, with the order of said Court allowing and approving the same as true and correct, said order dated December 11, 1926.

19. The brief of evidence introduced on the jury trial of said case with the written approval of the same as true and correct by the trial court on December 11, 1926.

20. The charge of the court to the jury, with the approval of the same thereon certifying the same as correct.

21. Judgment of the trial court dated December 11, 1926, overruling motion for new trial, and new trial refused.

22. Bill of exceptions to Court of Appeals of Georgia.

[fol. 12] 23. Opinion of Court of Appeals of Georgia and judgment affirming trial court.

24. This praecipe.

25. The Clerk's certficate.

Western Atlantic Railroad, by Fitzgerald Hall, Vice-President & General Counsel. Tye, Thomson & Tye, Division Counsel.

GEORGIA,
Fulton County:

Personally appeared before me John L. Tye, Jr., who being sworn deposeth that he is a member of the law firm

of Tye, Thomson & Tye, Division Counsel for the Western & Atlantic Railroad in the State of Georgia, and that as such on refusal to accept service he served an exact copy of foregoing Præcipe for transcript of record October 6th, 1928, on William E. Mann personally, attorney of record for Mrs. Mary E. Henderson, appellee, and also on October 6th, 1928, served an exact copy of foregoing Præcipe for transcript on J. A. McFarland personally, attorney of record for Maryland Casualty Company, appellee.

John L. Tye, Jr.

Sworn to and subscribed before me October 8th, 1928. Roy M. Brown, Notary Public, Georgia, State at Large. (Seal of Roy M. Brown, Notary Public, Georgia, State at Large.)

[File endorsement omitted.]

[fols. 13 & 14] Supersedeas bond on appeal for $30,000, approved and filed October 5, 1928, omitted in printing.

[fol. 15] In Court of Appeals of Georgia

No. 17,921

Western & Atlantic Railroad, Plaintiff in Error,

vs.

Mrs. Mary E. Henderson et al., Defendants in Error

From the Superior Court of Whitfield County, Georgia

Petition for Certiorari—Filed in Supreme Court May 12, 1927

To the Honorable the Supreme Court of Georgia:

The petition of the Western & Atlantic Railroad respectfully shows:

Mrs. Henderson sued the Western & Atlantic Railroad for damages claimed to have been sustained by the homi-

cide of her husband from negligence, when he was driving an automobile truck over the crossing at grade of a public road and the railroad, coming into collision with a locomotive of defendant.

The allegations of negligence, in the petition of plaintiff, were:

Failing to maintain the crossing in proper condition and repair.

Failing to give warning and signal of the approach of the train by blasts of the locomotive whistle.

Failing to keep a proper lookout after reaching the blow post.

Failing to check the speed of the train after seeing deceased crossing the tracks.

Accellerating the speed of the train and running into the truck.

Running at the great and dangerous speed of forty miles per hour upon and over the crossing.

Failing to stop the locomotive after the danger was apparent to the employes of defendant in charge of the same.

In not having the locomotive under control in approach-[fol. 16] ing the crossing.

The Maryland Casualty Company intervened in the cause, alleging that under the Georgia Workmen's Compensation Act, it was insurer of the Coca-Cola Bottling Company, employer of plaintiff's husband, and that it had paid, as such, certain sums to plaintiff; and praying that if defendant were found liable for the death, it (said Casualty Company) might be subrogated to the right of plaintiff to the extent of reimbursement for the payments so made.

The cause was tried and there was a verdict for plaintiff for ten thousand dollars.

The motion for new trial made by the defendant being overruled, it took the case to the Court of Appeals of Georgia, by which a new trial was granted on account of a misleading instruction to the jury as to the claim of the Casualty Company. Western & Atlantic Railroad vs. Henderson et al., 35 Ga. App. 353.

Thereafter plaintiff amended her petition by alleging, as additional negligence of defendant, that at the time her

husband was killed, the engineer of the train by which he was killed was very near sighted, about blind in one of his eyes; that this condition had existed for a long time prior to the killing and grew worse until her husband's death, and that defendant was negligent in running the train in control of a practically blind engineer.

Defendant amended its answer, which contained general denials of the allegations of negligence, by alleging:

1. That the accident was caused solely by the negligence of deceased.

2. That he was not in the exercise of ordinary care at the time.

[fol. 17] 3. That he was, himself, guilty of negligence which contributed approximately to his death.

The second trial of the case resulted in a verdict for plaintiff for fifteen thousand dollars and in favor of the Casualty Company.

The motion and amended motion for new trial, made by defendant, being overruled by the trial court, defendant again took the cause to the Court of Appeals of Georgia, by which on April 13th, 1927, the judgment of the court below was affirmed.

Your petitioner presents this petition for certiorari as to the rulings of the Court of Appeals, made in its judgment and decision of April 13th, 1927, due notice having been given of its intention to apply to this Honorable Court for the writ of certiorari, and your petitioner furnishing, as an exhibit hereto, a certified copy of the entire record in the case, so heard and decided, the said transcript of record containing copy of the judgment and opinion of the Court of Appeals herein complained of.

Assignments of Error

I

In its motion for new trial the defendant complained of error in the refusal of the judge of the trial court to give in charge to the jury the following written request to charge, made by its counsel at the proper time:

"Although a presumption of negligence arises against the defendant if it appears from the evidence that plaintiff's deceased husband was killed by the running of defendant's locomotive or cars, yet the defendant can defeat a recovery by plaintiff, by establishing either one of the following defenses:

[fol. 18] 1. That defendant and its employees exercised all ordinary and reasonable care and diligence to avoid the injury.

2. That the killing of plaintiff's deceased husband was proximately caused by his own negligence.

3. That the plaintiff's deceased husband, by the use of ordinary care on his part, could and should have avoided the injury to himself although caused by the negligence of defendant or its employees.

4. That if both the plaintiff's deceased husband and defendant's employees were negligent in causing the death of said deceased, the negligence of said deceased was equal to or greater than the negligence of defendant and its employees.

The court instructs the jury that if defendant establishes, by a preponderance of the evidence, either of said four defenses the plaintiff would not be entitled to recover any damages of defendant."

The refusal to give this request in charge was made ground numbered 7 of the amendment to the motion for new trial.

The Court of Appeals rules that the refusal to give this request in charge to the jury was not reversible error.

The refusal was excepted to by defendant, in its said amended motion for new trial, because the same was a correct and appropriate instruction, and was material and necessary in view of the fact that the judge of the trial court, after stating to the jury the contentions of the parties, immediately charged them as follows:

"I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, [fol. 19] the presumption arises that the railroad company

and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for recovery of damages by reason of such injury, would be entitled to recover."

Which charge so given allowed defendant only one defense, which was to show by a preponderance of the evidence, in the event it appeared that deceased was killed by operation of the locomotive or train, that its employees exercised ordinary care and diligence in the particulars wherein they were alleged to have been negligent, and that unless defendant did so the plaintiff would be entitled to recover.

Your petitioner respectfully contends that in ruling that it was not reversible error to refuse to give said requested instruction to the jury the Court of Appeals committed error, because the effect of said refusal, taken in connection with the charge given, as hereinbefore quoted, was naturally to leave the jury under the impression that defendant's defense was limited as hereinbefore stated.

II

In ground numbered 10 of the amendment to its motion for new trial defendant complained of error in the refusal of the judge of the trial court to give in charge to the jury the following written request to charge made by its counsel at the proper time:

"Where the view or hearing of a traveller approaching a railroad crossing is obstructed, he is under the duty of [fol. 20] using greater care and prudence in looking and listening for approaching trains than where there is no obstruction, the degree of care which he must exercise in such case, particularly where he is familiar with the crossing must be in proportion to the increase of danger and must be such care and prudence in looking and listening as an ordinarily prudent man would exercise under like circum-

stances of obstruction of view or hearing; and if he fails to use such care whereby he is injured, he is guilty of contributory negligence barring any right of recovery."

The Court of Appeals ruled and decided that the refusal to give to the jury this requested instruction was not reversible error.

The refusal was excepted to by the defendant, in its said ground of its amendment to the motion for new trial, because it was a correct and appropriate instruction on a material issue in the case.

The only portion of the charge of the court touching on the subject-matter of this request to charge was as follows:

"I charge you if, when the plaintiff's husband approached the crossing in question, he found his view of the railroad track, and of the crossing, and of any train that might be approaching thereto, obliterated at the time by obstruction, the law required of him the degree of care commensurate with the danger of the situation, and such degree of care as an ordinarily prudent person would have exercised under such circumstances. If he failed to exercise that degree of care, and if his failure so to do resulted in his death, the plaintiff is not entitled to recover."

Movant contends that the said quoted charge related solely to obstructions to the view of the deceased, whereas [fol. 21] the requested instructions related to obstruction to both sight and hearing, and that it was as material to charge as to obstruction of hearing as with reference to obstruction of view.

The Court of Appeals held and decided that it was not reversible error to refuse to give said requested instruction.

In so holding, your petitioner respectfully contends, the said court committed error, because the instruction requested was a pertinent statement, legally applicable to issues in the case, and the failure to charge as to obstruction of hearing as well as obstruction of sight was harmful to petitioner.

III

In ground numbered 12 of the amendment to its motion for new trial the defendant alleged as error that the court

charged the jury that defendant contended that the eyesight of the engineer, who was operating the train at the time of the collision, was not defective.

The Court of Appeals held and decided that the said charge showed no reversible error.

In its said ground of the amendment to the motion for new trial the movant alleged that this charge inaccurately stated the contention of defendant, in that defendant did not deny that the engineer's eyesight was defective to the extent that he was to some extent near sighted, but that this defect was fully overcome by eye glasses which he was using at the time, which enabled him to see objects at a distance as well as he could have done with his natural eyes had they not been defective in the particular above mentioned; and that said inaccurate statement of its contention placed defendant in the attitude of denying that there was any defect [fol. 22] whatsoever of the eyes of the engineer, instead of its real contention as above stated.

Your petitioner respectfully contends that in holding and deciding that in so charging there was no reversible error, the Court of Appeals committed error, because to give to a jury a theory of the case as a contention of a party what is not its contention and is a theory unsupported by evidence, is naturally harmful and reversible error.

IV

In the ground of the amendment to its motion for new trial numbered 13, movant contended that the court committed error, after reading to the jury the provisions of Code Section 2677 (b) in thereupon charging the jury as follows:

"I charge you that due care, as referred to in the section of the Code just read in your hearing, has reference to ordinary care. Whatever ordinary care required in the operation of his engine, that, the engineer should have done.

"I charge you, if at the time of the alleged homicide, the engineer in charge of the locomotive of the defendant railroad was guilty of a violation of either of the provisions of the section of the Code which has just been read in your hearing, and such violation is charged in the plaintiff's petition, and you further find that the injury or death of the

plaintiff's husband resulted by reason of a violation of the section of the Code just read in your hearing, as may have been specified in the plaintiff's petition, and you further find that the plaintiff's husband could not have by the exercise of ordinary care for his own safety avoided the consequences to himself of such negligent act on the part of the defendant company's engineer, then the plaintiff in this [fol. 23] case would be entitled to recover."

The Court of Appeals held and decided that in so charging there was no reversible error.

In the said ground of the amendment to the motion for new trial defendant contended that the giving to the jury of the instruction herein set forth was error, because it was conclusively shown by the uncontradicted evidence that the engineer of the locomotive, in approaching the crossing, fully complied with the requirements of Code Section 2677 (b) as to the blowing of the crossing signals as he approached the crossing, and it was error to submit to the jury, as a disputed issue to be passed upon by the jury, a matter not really disputable under the evidence, and was calculated to mislead the jury into the erroneous supposition that there was evidence to support plaintiff's contention in said particular.

Your petitioner respectfully contends that the Court of Appeals committed error in holding and deciding that there was no reversible error in this portion of the charge, because the charge so given submitted to the jury as an issuable matter under the evidence, what was shown by the evidence to have been not disputable, and suggested to the jury that as to said matter there was evidence to support the contention of plaintiff, which was naturally harmful to defendant and did constitute reversible error.

V

In the ground of its amended motion for new trial numbered 15 defendant alleged error because the counsel for defendant made at the proper time the following written request to charge:

"I charge you that no person shall recover damages from [fol. 24] the railroad company for injuries to a person

where the same is caused by that person's own negligence. If the deceased and the agents of the defendant company are both at fault, the plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him; but I charge you further in this connection that if the deceased, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, plaintiff cannot recover, nor can plaintiff recover any damages, unless the amount of fault attributable to deceased is less than the amount of fault attributable to the employees of the defendant."

And the trial judge refused to give in charge to the jury, as part of said requested instruction, the first sentence thereof to wit:

"I charge you that no person shall recover damages from a railroad company for injuries to a person where the same is caused by that person's own negligence," but gave in charge only the remaining portion of said requested instruction.

The Court of Appeals held and decided that this did not constitute reversible error.

Your petitioner respectfully contends that the Court of Appeals committed error in so holding and deciding, because, as contended by defendant in said ground of its amendment to the motion for new trial, and as now contended by your petitioner, the refusal to give said request in its entirety and the refusal to give in charge said first sentence of the request, was error in that one of the leading grounds of defense was that the death of deceased was caused by his own negligence in driving his truck, along the highway towards defendant's main track, on the crossing in question, with a clear and unobstructed view of the near and [fol. 25] rapidly approaching train, which, as defendant contended, was within the unobstructed view of the deceased during the last forty feet and more of his approach to said track on said crossing, the locomotive engineer having blown the crossing signals required by law, and approaching the crossing at the rate of 30 miles per hour, while deceased was approaching the crossing at 8 or 10 miles per hour, it was obviously extremely dangerous for deceased to

attempt to drive his truck across said track, in front of such rapidly approaching train, in such close proximity to the crossing, and the collision having been neither caused nor contributed to by any defective condition of the crossing, but because of deceased's own negligence, as hereinbefore stated, it was manifest and reversible error, not to give said request to charge as a whole, and to omit the first sentence thereof in instructing the jury, the said request, as a whole, being a correct and appropriate statement of the law applicable to material issues in the case.

VI

In the ground of its amendment to the motion for new trial numbered 17 the defendant alleged error because of the court not giving, in its entirety, the following written request to charge made by counsel for defendant:

"I charge you that both the railroad company and a traveller upon the highway have the right to pass over a railroad crossing and neither has the right to interfere with a proper use of it by the other. But owing to the momentum of trains, the confinement of their movement to a track, and the necessities and public nature of railroad traffic, the railway company has the right of way, and a traveller must wait until the immediately approaching train, the coming [fol. 26] of which he knows, or ought to know, has passed. The right of passage is in the railway company."

The court gave this request in charge omitting the words "or ought to know" immediately following the words "the coming of which he knows."

The Court of Appeals held and decided that in this there was no reversible error.

Your petitioner respectfully contends that in so holding and deciding the Court of Appeals committed error, because, as it contended in said ground of its motion for new trial, and now contends, said omission was hurtful error, placing upon defendant the burden of showing that deceased actually knew of the coming of the train; one of the material contentions of defendant being that when deceased attempted to drive the truck across the track he knew, or in the exercise of ordinary care should have known, that the

train was immediately approaching on said track at a rapid speed, and in such close proximity to the crossing as that there would be very great danger of a collision of the train with the truck; and that if he, notwithstanding, then attempted to cross, ahead of the train, without recognizing its priority of right, his wife could not recover for his death caused by such attempt, it being his duty to wait.

VII

The trial court charged the jury as follows:

"I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petitioner, and the burden thereupon shifts [fol. 27] to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be entitled to recover."

The Court of Appeals held and decided that the Code Section in question (Civil Code of 1910, Section 2780) had uniformly and repeatedly been construed by the Court of Appeals and by the Supreme Court exactly as it was construed by the trial judge; that it was obvious from admissions of counsel for plaintiff in error that this was true, and that the said counsel also contended that the statute itself (Code Section 2780) was in violation of the Fourteenth Amendment to the Constitution of the United States; that it was thus obvious that the statute itself was the primary object of attack, and such an attack could not properly be made in a motion for new trial, as "A constitutional question can not be raised for the first time in a motion for new trial."

Your petitioner respectfully contends that in so ruling and deciding the Court of Appeals committed error; that it was error to decide that a constitutional question can not be raised for the first time in a motion for new trial.

Your petitioner respectfully contends, as it contended in its assignments of error in ground numbered 18 of the amendment to its motion for new trial, that the quoted charge was error in that it required the railroad company, when it was shown by plaintiff that injury or damage had been sustained by the operation of its engine and cars, to [fol. 28] by evidence disprove every averment of negligence in plaintiff's petition, however fanciful such averment may be or however unsupported it may be by evidence.

Also, that said charge was error because it puts upon defendant the necessity and cost of obtaining attendance of witnesses, or other evidence, to sustain the burden of disproving mere allegations of negligence which plaintiff has introduced no evidence to support and may never have intended to endeavor to support by evidence; so that, without any evidence for plaintiff, except of injury or damage by operation of the locomotive and cars, defendant must suffer a finding against it of negligence as to every imputation thereof in plaintiff's petition, unless it produces disproof of every such imputation, however lacking is proof of such imputation, on the part of plaintiff.

Also, that the burden so placed upon it, by said charge, was unjust and the charge was violative of the Fourteenth Amendment of the Constitution of the United States, providing: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," in that the said charge as so given tended to deprive movant of its property without due process of law, by subjecting defendant to the burden of disproving every accusation of negligence made against it in the petition of plaintiff, simply upon proof by plaintiff that deceased was killed by the running of one of defendant's locomotives and trains.

Also, that if the language of the Statute of Georgia (Code of Georgia, 1910, Section 2780), can properly be construed and applied as it was construed and applied in said quoted charge, the said Statute was unconstitutional, because it [fol. 29] is in conflict with the said above quoted provision of said Fourteenth Amendment, because, as so construed and applied, said statute tended to deprive movant of its property without due process of law, by subjecting it to

the burden of disproving every allegation of negligence in plaintiff's petition, simply upon proof by plaintiff that decedent was killed by the running of one of defendant's locomotives and trains.

Your petitioner respectfully contends that the said ruling and decision of the Court of Appeals was error for the reasons herein above stated. That it was error for the said Court of Appeals to hold and decide, as it did, that the attack upon the constitutionality of the statute embodied in said section 2780, could not be made in a motion for new trial. Also, that said court erred in not granting a new trial upon said ground numbered 18 of said amendment to the motion for new trial, or the determination of said constitutional question being necessary to a determination of the cause, in not transfering to this Honorable Court the said cause for determination.

Your petitioner respectfully contends and submits that errors were committed by the Court of Appeals as above stated; that said errors were material and involved questions manifestly of gravity and importance, and especially as to the questions made in ground numbered 18 of the amendment to the motion for new trial, and as to the constitutionality of the statute embodied in Section 2780 of the Code of Georgia of 1910, as construed and applied by the court.

Wherefore, your petitioner praying leave of reference to the brief of its counsel herewith filed for a full statement of its reasons for claiming that such material errors were [fol. 30] committed and that they were of such character as that the writ of certiorari should be allowed, prays that writ of certiorari to the Court of Appeals of Georgia in the above stated cause be allowed, and that upon consideration of the cause the decision of said court be adjudged to have been erroneous and a new trial be granted.

And your petitioner will ever pray, etc.

Western & Atlantic Railroad, by Maddox, Maddox & Mitchell, residing at Dalton, Ga.; Neel & Neel, Cartersville, Ga.; Tye, Peeples & Tye, Atlanta, Ga., its Attorneys-at-Law.

[File endorsement omitted.]

[fol. 31] IN SUPREME COURT OF GEORGIA

ORDER GRANTING CERTIORARI

Atlanta, July 6, 1927.

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WESTERN & ATLANTIC RAILROAD

v.

M. E. HENDERSON et al.

Upon consideration of the motion for a rehearing filed in this case, and upon a reconsideration of the application for certiorari filed to review the judgment of the Court of Appeals, it is ordered that the certiorari be granted and that this order operate as the writ. The case is assigned to the trial calendar for hearing October 3, 1927, upon the record now of file.

[fol. 32] IN SUPREME COURT OF GEORGIA

[Title omitted]

OPINION—September 15, 1928

By the COURT:

1. Section 2780 of the Civil Code of 1910, which is as follows: "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company," is not unconstitutional for any reason assigned in the petition for certiorari.

2. Construing that section as the mere establishment of a rule of evidence, which is an authorized governmental

function of a State, the rule establishing a prima facie right of recovery in favor of one injured by the operation of the trains of a railroad company, upon proof of injury caused by the train, does not contravene the due process provided by the fourteenth amendment to the constitution of the United States. Nor is the case altered by reason of the fact that upon proof of the injury accruing to the complainant a presumption arises that the railroad company was negligent in the respects alleged in the petition, since no other witnesses can so well know the condition of the machinery and the manner in which the train was operated as the employees of the defendant.

Mrs. Mary E. Henderson filed suit against the Western and Atlantic Railroad, seeking to recover damages for the homicide of her husband, which was alleged to have been [fol. 33] caused by the negligence of the defendant and its servants and employees. It is alleged that a train of the defendant struck an automobile truck driven by the plaintiff's husband as it was crossing the railroad tracks on the crossing of a public road and the railroad. The plaintiff's husband was killed, and the widow sues for the value of his life. The specific allegations of negligence in the petition were: (a) Failing to maintain the crossing in proper condition and repair. (b) Failing to give warning and signal of the approach of the train by blasts of the locomotive whistle. (c) Failing to keep a proper lookout after reaching the blowpost. (d) Failing to check the speed of the train after seeing deceased crossing the tracks. (e) Accelerating the speed of the train and running into the truck. (f) Running at the great and dangerous speed of forty miles per hour upon and over the crossing. (g) Failing to stop the locomotive after the danger was apparent to the employees of defendant in charge of the same. (h) Not having the locomotive under control in approaching the crossing.

The Maryland Casualty Company intervened, alleging that under the Georgia Workmen's Compensation Act it was the insurer of the Coca Cola Bottling Company, the employer of the plaintiff's deceased husband, and that as such insurer it had paid certain sums to the plaintiff, and prayed that if defendant were found liable for the death

the said casualty company be subrogated to the right of the plaintiff, to the extent of reimbursement for the payments so made. Upon the trial the jury returned a verdict for the plaintiff for $10,000, and in favor of the casualty company upon its intervention. The defendant made a motion for a new trial, which was overruled. It carried [fol. 34] the case to the Court of Appeals, which court granted a new trial upon one exception alone, that the court had erroneously instructed the jury as to the claim of the casualty company. 35 Ga. App. 353. The court held that the remaining assignments of error were not meritorious. Thereafter the plaintiff amended her petition by alleging as additional negligence of the defendant, that at the time her husband was killed the engineer of the train which killed him was very near-sighted, in fact practically blind in one of his eyes, which condition had existed for a long time prior to her husband's death and grew worse until his death, and that defendant was negligent in permitting such engineer to run said train. The defendant amended its answer, which contained general denials of the allegations of negligence, by alleging: 1. That the accident was caused solely by the negligence of the deceased. 2. That he was not in the exercise of ordinary care at the time. 3. That he was himself guilty of negligence which contributed approximately to his death.

Upon a second trial of the case the jury returned a verdict for the plaintiff for $15,000, and in favor of the intervention of the casualty company. The defendant moved for a new trial, which motion was overruled, and the defendant again carried the case to the Court of Appeals, which affirmed the judgment overruling the motion. Thereupon the defendant railroad presented in this court its petition for certiorari, and the writ was granted.

In the petition for certiorari the assignments of error are set forth as follows:

"1. In its motion for new trial the defendant complained of error in the refusal of the judge of the trial court to give in charge to the jury the following written request to charge, [fol. 35] made by its counsel at the proper time: 'Although a presumption of negligence arises against the defendant if it appears from the evidence that plaintiff's deceased husband was killed by the running of defendant's locomo-

tive or cars, yet the defendant can defeat a recovery by plaintiff by establishing either one of the following defenses: 1. That defendant and its employees exercised all ordinary and reasonable care and diligence to avoid the injury. 2. That the killing of plaintiff's deceased husband was proximately caused by his own negligence. 3. That the plaintiff's deceased husband, by the use of ordinary care on his part, could and should have avoided the injury to himself although caused by the negligence of defendant or its employees. 4. That if both the plaintiff's deceased husband and defendant's employees were negligent in causing the death of said deceased, the negligence of said deceased was equal to or greater than the negligence of defendant and its employees. The court instructs the jury that if the defendant establishes, by a preponderance of the evidence, either of said four defenses, the plaintiff would not be entitled to recover any damages of defendant." The refusal to give this request in charge was made ground numbered 7 of the amendment to the motion for new trial. The Court of Appeals ruled that the refusal to give this request in charge was not reversible error. The refusal was excepted to by defendant, in its said amended motion for new trial, because the same was a correct and appropriate instruction, and was material and necessary in view of the fact that the judge of the trial court, after stating to the jury the contentions of the parties, immediately charged them as follows: 'I charge you that, when it has been made to appear that injury or damage has [fol. 36] occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for recovery of damages by reason of such injury, would be entitled to recover.' Which charge so given allowed defendant only one defense, which was to show by a preponderance of the evidence, in the event it appeared that deceased was killed

by operation of the locomotive or train, that its employees exercised ordinary care and diligence in the particulars wherein they were alleged to have been negligent, and that unless defendant did so the plaintiff would be entitled to recover. Your petitioner respectfully contends that in ruling that it was not reversible error to refuse to give such requested instruction to the jury the Court of Appeals committed error, because the effect of said refusal, taken in connection with the charge given, as hereinbefore quoted, was naturally to leave the jury under the impression that defendant's defense was limited as hereinbefore stated."

"11. In ground numbered 10 of the amendment to its motion for new trial defendant complained of error in the refusal of the judge of the trial court to give in charge to the jury the following written request to charge, made by its counsel at the proper time: 'Where the view or hearing of a traveler approaching a railroad crossing is obstructed, he is under the duty of using greater care and [fol. 37] prudence in looking and listening for approaching trains than where there is no obstruction; the degree of care which he must exercise in such a case, particularly where he is familiar with the crossing must be in proportion to the increase of danger, and must be such care and prudence in looking and listening as an ordinarily prudent man would exercise under like circumstances of obstruction of view or hearing; and if he fails to use such care whereby he is injured, he is guilty of contributory negligence barring any right of recovery.' The Court of Appeals ruled and decided that the refusal to give to the jury this requested instruction was not reversible error. The refusal was excepted to by the defendant in its said ground of its amendment to the motion for a new trial, because it was a correct and appropriate instruction on a material issue in the case. The only portion of the charge of the court touching on the subject matter of this request to charge was as follows: 'I charge you if, when the plaintiff's husband approached the crossing in question, he found his view of the railroad track, and of the crossing, and of any train that might be approaching thereto, obliterated at the time by obstruction, the law required of him the degree of care commensurate with the danger of the

situation, and such degree of care as an ordinarily prudent person would have exercised under such circumstances. If he failed to exercise that degree of care, and if his failure so to do resulted in his death, the plaintiff is not entitled to recover.' Movant contends that the said quoted charge related solely to obstructions to the view of the deceased; whereas the requested instruction related to both sight and hearing, and that it was as material to charge as to obstruction of hearing as with reference to obstruction of [fol. 38] view. The Court of Appeals held and decided that it was not reversible error to refuse to give said requested instruction. In so holding, your petitioner respectfully contends, the said court committed error, because the instruction requested was a pertinent statement, legally applicable to issues in the case, and the failure to charge as to obstruction of hearing as well as obstruction of sight was harmful to petitioner."

"III. In ground numbered 12 of the amendment to its motion for new trial the defendant alleged as error that the court charged the jury that defendant contended that the eyesight of the engineer who was operating the train at the time of the collission was not defective. The Court of Appeals held and decided that the said charge showed no reversible error. In its said ground of the amendment to the motion for new trial the movant alleged that this charge inaccurately stated the contention of defendant, in that defendant did not deny that the engineer's sight was defective to the extent that he was to some extent nearsighted, but that this defect was fully overcome by eyeglasses which he was using at the time, which enabled him to see objects at a distance as well as he could have done with his natural eyes had they not been defective in the particular above mentioned; and that said inaccurate statement of its contention placed defendant in the attitude of denying that there was any defect whatsoever of the eyes of the engineer, instead of its real contention as above stated. Your petitioner respectfully contends that in holding and deciding that in so charging there was no reversible error, the Court of Appeals committed error, because to give to a jury a theory of the case as a contention of a party which is not its contention and is a theory unsupported by evidence, is [fol. 39] naturally harmful and reversible error."

"IV. In the ground of the amendment to its motion for new trial numbered 13, movant contended that the court committed error, after reading to the jury the provisions of Code Section 2677(b), in thereupon charging the jury as follows: 'I charge you that due care, as referred to in the section of the Code just read in your hearing, has reference to ordinary care. Whatever ordinary care required in the operation of his engine, that the engineer should have done. I charge you, if at the time of the alleged homicide, the engineer in charge of the locomotive of the defendant railroad was guilty of a violation of either of the provisions of the section of the Code which has just been read in your hearing, and such violation is charged in the plaintiff's petition, and you further find that the injury or death of the plaintiff's husband resulted by reason of a violation of the section of the Code just read in your hearing, as may have been specified in the plaintiff's petition, and you further find that the plaintiff's husband could not by the exercise of ordinary care for his own safety have avoided the consequences to himself of such negligent act on the part of the defendant company's engineer, then the plaintiff in this case would be entitled to recover.' The Court of Appeals held and decided that in so charging there was no reversible error. In the said ground of the amendment to the motion for new trial defendant contended that the giving to the jury of the instruction herein set forth was error, because it was conclusively shown by the uncontradicted evidence that the engineer of the locomotive, in approaching the crossing, fully complied with the requirements of Code section 2677 (b), as to the blowing of crossing signals as he approached [fol. 40] the crossing, and it was error to submit to the jury, as a disputed issue to be passed upon by the jury, a matter not really disputable under the evidence, and was calculated to mislead the jury into the erroneous supposition that there was evidence to support plaintiff's contention in said particular. Your petitioner respectfully contends that the Court of Appeals committed error in holding and deciding that there was no reversible error in this portion of the charge, because the charge so given submitted to the jury as an issuable matter under the evidence, what was shown by the evidence to have been not disputable, and suggested to the jury as to said matter there was evidence to support the

contention of plaintiff, which was naturally harmful to defendant and did constitute reversible error."

"V. In the ground of its amended motion for new trial numbered 15 defendant alleged error because the counsel for defendant made at the proper time the following written request to charge: 'I charge you that no person shall recover damages from the railroad company for injuries to a person where the same is caused by that person's own negligence. If the deceased and the agents of the defendant company are both at fault, the plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him; but I charge you further in this connection that if the deceased, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, plaintiff can not recover, nor can plaintiff recover any damages, unless the amount of fault attributable to deceased is less than the amount of fault attributable to the employees of the defendant.' And the trial judge refused to give in charge to the jury, as part of said requested instruction, the first sen-[fol. 41] tence thereof, to wit: 'I charge you that no person shall recover damages from a railroad company for injuries to a person where the same is caused by that person's own negligence,' but gave in charge only the remaining portion of said requested instruction. The Court of Appeals held and decided that this did not constitute reversible error. Your petitioner respectfully contends that the Court of Appeals committed error in so holding and deciding, because, as contended by defendant in said ground of its amendment to the motion for new trial, and as now contended by your petitioner, the refusal to give said request in its entirety and the refusal to give in charge said first sentence of the request, was error in that one of the leading grounds of defense was that the death of the deceased was caused by his own negligence in driving his truck, along the highway towards defendant's main track, on the crossing in question, with a clear and unobstructed view of the near and rapidly approaching train, which, as defendant contended, was within the unobstructed view of the deceased during the last forty feet and more of his approach to said track on said crossing, the locomotive engineer having blown the crossing signals required by law, and approaching the cross-

ing at the rate of 30 miles per hour, while deceased was approaching the crossing at 8 or 10 miles per hour, it was obviously dangerous for deceased to attempt to drive his truck across said track, in front of such rapidly approaching train, in such close proximity to the crossing; and the collision having been neither caused nor contributed to by any defective condition of the crossing, but because of deceased's own negligence, as hereinbefore stated, it was manifest and reversible error, not to give said request to charge as a whole, and to omit the first sentence thereof in instructing [fol. 42] the jury, the said request, as a whole, being a correct and appropriate statement of the law applicable to material issues in the case."

"VI. In the ground of its amendment to the motion for new trial numbered 17 the defendant alleged error because of the court not giving, in its entirety, the following written request to charge made by counsel for defendant: 'I charge you that both the railroad company and a traveler upon the highway have the right to pass over a railroad-crossing and neither has the right to interfere with the proper use of it by the other. But owing to the momentum of trains, the confinement of their movement to a track, and the necessities and public nature of railroad traffic, the railway company has the right of way, and a traveler must wait until the immediately approaching train, the coming of which he knows, or ought to know, has passed. The right of passage is in the railway company.' The court gave this request in charge omitting the words 'or ought to know' immediately following the words, 'the coming of which he knows.' The Court of Appeals held and decided that in this there was no reversible error. Your petitioner respectfuly contends that in so holding and deciding the Court of Appeals committed error, because, as it contended in said ground of its motion for new trial, and nov. contends, said omission was hurtful error, placing upon defendant the burden of showing that deceased actually knew of the coming of the train; one of the material contentions of defendant being that when deceased attempted to drive the truck across the track he knew, or in the exercise of *of* ordinary care should have known, that the train was immediately approaching on said track at a rapid speed, and in such close proximity to the [fol. 43] crossing as that there would be very great danger

of a collision of the train with the truck; and that if he, notwithstanding, then attempted to cross, ahead of the train, without recognizing its priority of right, his wife could not recover for his death caused by such attempt, it being his duty to wait."

"VII. The trial court charged the jury as follows: 'I charge you that when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent; and unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be entitled to recover.' The Court of Appeals held and decided that the code section in question (Civil Code of 1910, section 2780) had uniformly and repeatedly been construed by the Court of Appeals and by the Supreme Court exactly as it was construed by the trial judge; that it was obvious from admissions of counsel for plaintiff in error that this was true, and that said counsel also contended that the statute itself (Code section 2780) was in violation of the fourteenth amendment to the Constitution of the United States; that it was thus obvious that the statute itself was the primary object of attack, and such an attack could not properly be made in a motion for new trial, as 'A constitutional question can not be raised for the [fol. 44] first time in a motion for new trial.' Your petitioner respectfully contends that in so ruling and deciding the Court of Appeals committed error; that it was error to decide that a constitutional question can not be raised for the first time in a motion for new trial. Your petitioner respectfully contends, as it contended in its assignments of error in ground numbered 18 of the amendment to its motion for new trial, that the quoted charge was error in that it required the railroad company, when it was shown by plaintiff that injury or damage had been sustained by the operation of its engine and cars, to by evidence disprove every averment of negligence in plaintiff's petition, how-

ever fanciful such averment may be or however unsupported it may be by evidence. Also, that said charge was error because it puts upon defendant the necessity and cost of obtaining attendance of witnesses, or other evidence, to sustain the burden of disproving mere allegations of negligence which plaintiff has introduced no evidence to support and may never have intended to endeavor to support by evidence; so that, without any evidence for plaintiff, except of injury or damage by operation of the locomotive and cars, defendant must suffer a finding against it of negligence as to every imputation thereof in plaintiff's petition, unless it produces disproof of every such imputation, however lacking is proof of such imputation, on the part of plaintiff. Also, that the burden so placed upon it, by said charge, was unjust, and the charge was violative of the fourteenth amendment of the Constitution of the United States providing: 'Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, in that said charge as so given tended to de- [fol. 45] prive movant of its property without due process of law, by subjecting defendant to the burden of disproving every accusation of negligence made against it in the petition of plaintiff, simply upon proof by plaintiff that deceased was killed by the running of one of defendant's locomotives and trains. Also, if the language of the statute of Georgia (Code of Georgia, 1910, section 2780) can properly be construed and applied as it was construed and applied in said quoted charge, the said statute is unconstitutional, because it is in conflict with the said above-quoted provision of said fourteenth amendment, because, as so construed and applied, said statute tended to deprive movant of its property without due process of law, by subjecting it to the burden of disproving every allegation of negligence in plaintiff's petition, simply upon proof by plaintiff that decedent was killed by the running of one of defendant's locomotives and trains. Your petitioner respectfully contends that the said ruling and decision of the Court of Appeals was error for the reasons herein above stated. That it was error for the said Court of Appeals to hold and decide, as it did, that the attack upon the constitutionality of

the statute embodied in said section 2780, could not be made in a motion for new trial. Also, that said court erred in not granting a new trial upon said ground numbered 18 of said amendment to the motion for new trial, or, the determination of said constitutional question being necessary to a determination of the cause, in not transferring to this honorable court the said cause for determination. Your petitioner respectfully contends and submits that errors were committed by the Court of Appeals as above stated; that said errors were material and involved questions manifestly of gravity and importance, and especially as to the [fol. 46] questions made in ground numbered 18 of the amendment to the motion for new trial, and as to the constitutionality of the statute embodied in section 2780 of the Code of Georgia of 1910, as construed and applied by the court."

The respondent moved to dismiss the application for certiorari and the writ, upon the grounds: (1) That the petition does not assign error upon any question of gravity or importance. (2) That the petition does not comply with rule 2 of this court on application for writ of certiorari, in that argument of counsel is fully set out in the different assignments of error, and the petition sets out only the contentions and assignments of error made in the motion for new trial. (3) Because all questions attempted to be made in the petition have been heretofore decided by this court, and there are therefore no questions of law to be settled. (4) Because the petition for certiorari completely ignores the holding of the Court of Appeals that its former decision, under facts substantially identical with those before the court upon the second appearance of the case, had become the law of the case, and settled the question adversely to the contentions of the plaintiff in error.

Russell, C. J. (after stating the foregoing facts):

1. This application for certiorari was granted by the court for the purpose of considering the question raised as to the constitutionality of section 2780 of the Code (1910). Is section 2780 unconstitutional as being in contravention of the fourteenth amendment to the constitution of the United States?

We praetermit any discussion of the motion to dismiss [fol. 47] the petition for certiorari because a majority of the court granted the writ solely for the purposes stated, and the motion to dismiss is overruled. Another and a very serious question would be presented if the motion to dismiss had been based upon a different ground. If the question whether this court has jurisdiction to consider upon certiorari the constitutionality of a statute (a question which the Court of Appeals has no jurisdiction to adjudicate) had been raised in the motion to dismiss, there would have been, as we just stated, an entirely different question before us. We do not at this time decide whether the Court of Appeals should properly have transferred this case to the Supreme Court because it involved the constitutionality of a statute, or whether they should have certified requests for instructions on the constitutional question involved in the case. Nor do we at this time decide the question upon which the Court of Appeals did rule in the first headnote of their decision, to wit, that a question as to the constitutionality of a statute can not be raised for the first time in a motion for new trial. Upon this subject the court is divided in opinion.

2. We are all agreed that section 2780 of the Code of 1910 is not unconstitutional for any reason assigned in the present petition for certiorari. Numerous decisions of this court might be cited to sustain this proposition. It has been often held by the Supreme Court of the United States that the creation of a rule of evidence, whereby the existence of essential facts in the case may be inferred from the proof of other facts or circumstances which have a natural and rational connection with the subject-matter, and the adoption of such a rule of evidence relating to the quantum of proof required in a State court, is not violative of [fol. 48] due process as guaranteed by the fourteenth amendment to the constitution of the United States. In the comparatively recent decision of the Supreme Court of the United States in Hawes v. Georgia, 258 U. S. 1, a writ of error to this court, it was ruled: "A State law providing that a person prosecuted for permitting apparatus for distilling intoxicating liquors to be upon real estate actually occupied by him shall be prima facie presumed to

have known of the presence of such apparatus there found, does not violate due process of law, even where the defendant is not allowed to testify under oath or to have the testimony of his wife." This seems to bear directly on the point. In this case Mr. Justice McKenna, speaking for the court, said: "The act of the State upon which the indictment was based [Acts Ex. Sess, 1917, p. 7] made it unlawful, among other things, 'to distill, manufacture, or make any alcoholic, spirituous, vinous, or malted liquors or intoxicating beverages' in the State. Section 22 of the act provides that when any apparatus used for such purposes 'is found or discovered upon said premises, the same shall be prima facie evidence that the person in actual possession had knowledge of the existence of the same, and, on conviction therefor, shall be punished as prescribed in section 16 of this act, the burden of proof in all cases being upon the person in actual possession to show the want of knowledge of the existence of such apparatus on his premises.'

"The trial court instructed the jury that Hawes was charged with knowing who had the apparatus upon the premises of which he was in possession or who operated it, and that under the act the burden was upon him to show that want of knowledge. And further, that all that the State had to show was that the apparatus was on the prem- [fol. 49] ises, and "When the State shows that, stopping there, that makes out a prima facie case against defendant, and you should find the defendant guilty as charged in the indictment unless he show that the apparatus was there without his consent and knowledge. The charge was made the basis of a motion for new trial on the ground that it was offensive of the due-process clause of the Constitution of the United States and also of the Constitution of Georgia. The same grounds were assigned in the Supreme Court of Georgia on appeal from the order and judgment denying the motion for new trial. In the Supreme Court the specific error against the charge of the court was that it cast upon Hawes the burden of 'showing the want of knowledge of the existence of the apparatus on his premises, and in fine his innocence of the crime with which he is charged,' he 'claiming that this was an unreasonable and arbitrary exercise of its power by the legislature of

the State of Georgia.' And this is the assignment here, in other words, that §22 creates a presumption of guilty knowledge from the finding of the apparatus upon the premises occupied by him, and that both the trial court and the Supreme Court of Georgia enforced this statutory presumption, and the same, therefore, entered into his conviction, and that the fourteenth amendment to the constitution of the United States was thereby violated. In aid of his contention and in emphasis of the effect of the statute against him, Hawes points out that a defendant in a criminal case is not allowed to testify as a witness, that he has only the right to make a statement under oath, and that husband and wife are not competent or compellable to give evidence in any criminal proceeding for or against each other.

[fol. 50] "It has been decided, as counsel concede, that the legislature may make one fact prima facie evidence of another, and it is certainly within the established power of a State to prescribe the evidence which is to be received in the courts of its own government. Adams v. New York, 192 U. S. 585, 588. In Hawkins v. Bleakly, 243 U. S. 210, 214, it is said, 'the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the State governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. Mobile, Jackson, and Kansas City R. R. Co. v. Turnipseed, 219 U. S. 35, 42.' Undoubtedly there must be a relation between the two facts. Bailey v. Alabama, 219 U. S. 219; McFarland v. American Sugar Refining Co., 241 U. S. 79. That is, if one may evidence the other, there must be connection between them, a requirement that reasoning insists on and, necessarily, the law. We think the condition is satisfied by the Georgia statute. Distilling spirits is not an ordinary incident of a farm and in a prohibition State has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the contrary, it may be presumed that one on such a farm or one who occupies it will know what there is upon it. It is not arbitrary for the State to act upon the presumption and

erect it into evidence of knowledge; not peremptory, of course, but subject to explanation, and affording the means of explanation. Hawes had such means. An explanatory statement was open to him with a detail of the circumstances of his acquisition of the place, and he availed himself of it. He could have called others to testify to the [fol. 51] circumstances of his acquisition for the circumstances were not so isolated or secret as not to have been known to others. We agree, therefore, with the Supreme Court of the State that the existence upon land of distilling apparatus, consisting of the still itself, boxes and barrels, has a natural relation to the fact that the occupant of the land has knowledge of the existence of such objects and their situation."

Another leading case is that of Mobile, &c., R. v. Turnipseed, 219 U. S. 35, in which Mr. Justice Lurton delivered the opinion of the highest court. In that case it was insisted that sections 3559 and 1985 of the Mississippi Code were repugnant to that clause of the fourteenth amendment to the constitution which guarantees to every person the equal protection of the laws. In dealing with the constitutionality of section 1985 of the Mississippi Code of 1906, the court said: "The objection made to this statute is that the railroad companies are thereby put into a class to themselves and deprived of the benefit of the general rule of law which placed upon one who sues in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff." This section of the Mississippi Code (§1985) is as follows: "Injury to Persons or Property by Railroads prima facie Evidence of Want of Skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotive or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees [fol. 52] of railroad companies." It will be noted that section 2780 of our Code, supra, lays down substantially the same rule of evidence as section 1985 of the Code of Mississippi. Its language is as follows: "A railroad company shall be liable for any damage done to persons, stock, or

other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." As said by the Supreme Court of the United States in the Turnipseed case, supra: "It is to be primarily observed that the statute is not made applicable to all actions against such companies. Its operation is plainly limited, first, to injuries sustained by passengers or employes of such companies; second, to injuries arising from the actual operation of trains or engines, and third, the effect of evidence showing an injury due to the operation of trains or engines is only 'prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury.' The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some common law aspects of the subject see Cincinnati, &c., Ry. v. South Fork Coal Co., 139 Fed. Rep. 528 et seq. Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and [fol. 53] State, dealing with such methods of proof — both civil and criminal cases abound, and the decisions upholding them are numerous. A few of the leading ones are Adams v. New York, 192 U. S. 585; People v. Cannon, 139 N. Y. 32; Norne v. Memphis, &c., Ry., 1 Coldwell (Tenn.), 72; Meadowcroft v. The People, 163 Illinois, 56; Commonwealth v. Williams, 6 Gray, 1; State v. Thomas, 144 Alabama, 77."

We are of the opinion that the Court of Appeals did not err in affirming the judgment of the trial court.

Judgment affirmed. All the Justices concur.

[fol. 54] IN SUPREME COURT OF GEORGIA

Atlanta, September 15, 1928.

The Honorable Supreme Court met pursuant to adjournment.

The following judgment was rendered:

WESTERN & ATLANTIC RAILROAD

v.

M. E. HENDERSON et al.

JUDGMENT

This case came before this court by writ of certiorari from the Court of Appeals of Georgia; and, after argument had, it is considered and adjudged that the judgment of the Court of Appeals be affirmed.

All the Justices concur.

[fol. 55] IN COURT OF APPEALS OF GEORGIA

No. 17,921

WESTERN & ATLANTIC RAILROAD, Plaintiff in Error,

vs.

MRS. MARY E. HENDERSON and MARYLAND CASUALTY COMPANY, Defendans in Error

Error from Superior Court, Whitfield County, Georgia

NOTICE OF PETITION FOR CERTIORARI—Filed April 18, 1927

To the Clerk of the Court of Appeals of Georgia:

Notice is hereby given to you that it is the intention of the plaintiff in error in the above stated cause to apply to the Supreme Court of Georgia for a writ of certiorari to review the judgment of the Court of Appeals of Georgia rendered in the case above stated on April 13th, 1927, affirming the judgment of the superior court of Whitfield county, Georgia.

You are respectfully requested to have prepared and certify a copy of the entire record in said cause within the time provided by the rules of the Supreme Court of Georgia.

This April 18th, 1927.

Tye, Peeples & Tye, Neel & Neel, Maddox, Maddox & Mitchell, Its Attorneys at Law.

[File endorsement omitted.]

[fol. 56] In Court of Appeals of Georgia

Bill of Exceptions and Order Settling Same—Filed Jan. 21, 1927

Georgia,

Whitfield County:

Be it remembered that heretofore, on the 12th day of October, 1926, at and during the October term, 1926, of the superior court of said county, the Hon. M. C. Tarver, judge of the superior courts of the Cherokee circuit, then and there presiding, there came on to be tried in said court, a certain action of complaint then and there pending in said court as complaint No. 19, returnable to the October term, 1924, thereof, the same being an action of complaint brought by Mary E. Henderson, as plaintiff, against Western & Atlantic Railroad, as defendant, for the recovery of damages for the alleged negligent homicide by said defendant of said plaintiff's husband, in which said action of complaint, the Maryland Casualty Company, an insurance corporation, afterwards, at the April Term, 1925, of said superior court, was allowed to intervene, and was made a party plaintiff with the said Mary E. Henderson, in said action, by the order of said court, granted in said case on April 18, 1925, upon the intervening petition, of said Maryland Casualty Company, whereby, from and since the date of said order said action has proceeded in favor of said Mary E. Henderson and said Maryland Casualty Company, as plaintiffs against said Western & Atlantic Railroad as defendant;

Be it further remembered that said case was then and there, on October 12, 1926, called for trial and the parties

having then and there announced ready, and a jury having been stricken, the plaintiffs introduced evidence, the defendant introduced evidence, argument of counsel was had, and the court charged the jury whereupon the jury, having retired and considered said case made and returned their verdict therein, on October 13, 1926, finding in favor of the [fol. 57] plaintiff, Mary E. Henderson, the sum of fifteen thousand dollars and further finding in favor of the plaintiff, the Maryland Casualy Company, which verdict was received by the court, and entered on the minutes thereof, and judgment rendered by the court on said verdict, on October 13, 1926.

Be it further remembered, that during the said term of said court and within thirty days from the date of said trial, the defendant made and filed its motion for a new trial in said case, on which the court granted an order setting said motion for hearing in vacation before the presiding judge aforesaid at Dalton, Georgia, on December 1st, 1926, and allowing movant until the hearing of the motion whenever it might be, in which to prepare and have approved by said presiding judge a brief of the evidence and file the same in the clerk's office at any time within ten days after the motion is heard and determined, and to amend said motion at any time before the final hearing thereof, on which last above named date the court by consent of all counsel for the parties postponed the hearing of said motion to December 11th, 1926, then to be heard before said judge at Dalton, Georgia, at an open session of the aforesaid October Term, 1926, of said superior court.

Be it further remembered that on the 11th day of December, 1926, at and during an open session of the October Term, 1926, of said superior court, movants' said motion for new trial in said case was called by the court and counsel for each of the parties to said case being then and there present, movant thereupon presented to the court for approval a brief of the evidence in said case, which was then and there duly approved by the court and filed as a part of the record of said case.

[fol. 58] Thereupon a further amendment to the motion for new trial on additional grounds, was then and there presented by movant to the court for allowance and approval and the same was then and there allowed and ap-

proved as correct by the court, and filed as part of the record of said case.

Thereupon on the same date, to wit, December 11th, 1926, in open court said motion for new trial was heard by said presiding judge at Dalton, Georgia, and on consideration, said judge then there there overruled said motion and granted an order overruling the same and refusing a new trial of said case; to which ruling and order, the movant, Western & Atlantic Railroad, then and there excepted and now excepts and assigns the same as error, and says the court erred in overruling said motion and in granting said order refusing a new trial, and in not granting a new trial on each and all of the grounds of said motion.

The Western & Atlantic Railroad names itself herein as plaintiff in error, and names said Mary E. Henderson, and said Maryland Casualty Company as defendants in error in this bill of exceptions.

The plaintiff in error specifies the following portions of the record in said case as material to a clear understanding of the errors in this bill of exceptions complained of, to wit:

1. The original petition of Mary E. Henderson, plaintiff in said case, and amendment to said petition with the clerk's filing entry on same.

2. The answer of the defendant to plaintiff's petition, and the amendment thereto with the clerk's filing entry on same.

3. The original intervening petition of Maryland Casualty Company, filed in said case on April 4, 1925, and the [fol. 59] order nisi of same date granted on said petition, together with written acknowledgment of service on said petition signed by counsel for Mary E. Henderson, plaintiff, and by counsel for Western & Atlantic Railroad dated April 6, 1925.

4. Defendant's response to said intervening petition of Maryland Casualty Company with clerk's entry on said response.

5. Order of court granted April 18th, 1925, allowing Maryland Casualty Company to intervene in said case and making it a party plaintiff therein.

6. Maryland Casualty Company's amendment to its intervening petition, said amendment allowed, and filed on October 12, 1925, and also amendment allowed October 12, 1926.

7. Verdict of jury in said case, dated October 13, 1926.

8. Judgment signed in said case on October 13, 1926.

9. The original motion for new trial in said case filed by Western & Atlantic Railroad, together with the court's order nisi granted thereon, and the order setting said motion for hearing on December 1st, 1926, and the acknowledgment of service thereon by counsel for said Mary E. Henderson and Maryland Casualty Company.

10. Movant's amendment to said motion for new trial with order of said court thereon allowing and approving the same as true and correct, said order dated December 11th, 1926, and the filing entry of the clerk of said court on said amendment.

11. The brief of evidence introduced on the jury trial of said case, with the written approval of the same as true and correct, by said court on December 11th, 1926, and the filing entry of the clerk of said court on same.

[fol. 60] 12. The charge of the court to the jury, with the approval of the court thereon certifying the same as correct, and the filing entry of the clerk of said court on same.

And now, within the time provided by law, on this the — day of January, 1927, and within thirty days of the entry of the order overruling said motion for new trial, comes the plaintiff in error herein, and tenders this its bill of exceptions and prays that the same may be certified as provided by law in order that the errors complained of may be considered and corrected by the Court of Appeals of Georgia.

Tye, Peeples & Tye, P. O. Atlanta, Georgia; Maddox, Maddox & Mitchell, P. O. Dalton, Georgia; Neel & Neel, P. O. Cartersville, Georgia, Attorneys for Plaintiff in Error.

I do certify that the foregoing bill of exceptions is true, and specifies all of the evidence, and specifies all of the record, material to a clear understanding of the errors complained of; and the clerk of the superior court of Whitfield county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the current term of the Court of Appeals of Georgia, that the errors alleged to have been committed may be considered and corrected.

This 5th day of January, 1927.

M. C. Tarver, J. S. C. C. C.

[fol. 61] Due and legal service acknowledged on foregoing bill of exceptions, and copy of same received.

This 5th day of January, 1927.

W. E. Mann, Gordon Mann, Attorneys for Mrs. Mary E. Henderson. J. A. McFarland, Attorney for Maryland Casualty Company, Defendant in Error.

GEORGIA,
Whitfield County:

Clerk's Office, Superior Court of Whitfield County

I do hereby certify that the foregoing pages of printing and writing is the true original bill of exceptions filed in this office in the case of Western & Atlantic Railroad, plaintiff in error, vs. Mary E. Henderson & Maryland Casualty Co., Intervenor, defendants in error, a copy of which is now of file in my office. This 20th day of Jan. 1927.

Witness my signature and the seal of said court hereto affixed the day and year above written.

M. Westbrook, Clerk of Superior Court. (Seal.)

Filed in office this 8th day of Jan. 1927. M. Westbrook, Clerk.

[File endorsement omitted.]

[fol. 62] In Superior Court of Whitfield County

Petition—Filed Sept. 16, 1924

To the Superior Court of said County:

The petition of Mrs. Mary E. Henderson, wife of J. C. Henderson late of Co. said county, deceased, respectfully shows to the court the facts making the following case:

1. That the defendant herein is the Western and Atlantic Railroad corporation having its line of road running through said county, and having an office and agent in said county on whom service may be perfected.

2. The said defendant has injured and damaged your petitioner in the sum of fifty thousand dollars by reason of the wrongs and injuries, carelessness and negligence in the killingg of her husband, said J. C. Henderson, as hereinafter more fully set forth.

3. Your petitioner further shows that on August 4th, 1924, about nine o'clock a. m. your petitioner's said husband was knocked off of the railroad crossing by an engine and train of defendant running south and being the southbound local freight train. The crossing referred to being the third crossing north of the Tunnel Hill Depot. Said killing was done by defendant's employees and servants in said county of Whitfield.

4. Petitioner further shows to the court that said defendant failed to keep and maintain its track and right of way of said railroad at said public road crossing in proper condition in that it suffered its track to become so rough and the ballast to be removed from the ties and railroad track at the said public road crossing as to render the same almost impassable by vehicles such as trucks, automobiles and other conveyances; in fact, the employees and servants of said defendant in charge of the said railroad tracks whose duty [fol. 63] it is to keep and maintain the said tracks and crossing in proper condition, removed the said ballast from the said public road crossing about a week before the killing of her said husband and which said removal of the said ballast left the cross-ties of said railroad over which the

said public road crossed the said railroad exposed and the rails of the tracks exposed some six or eight inches and by reason of the exposed cross-ties and the exposed rails of said railroad company at said public road crossing same was rendered unsafe for travel and dangerous to persons and travelers going over the said public road crossing at this place. That this was negligence on the part of the said defendant and a violation of its duty to maintain and keep the said public road crossing in repair.

5. Petitioner further shows that her said husband was driving a large truck and going from Dalton, Ga., in the direction of Ringgold, Ga., and in so doing the railroad track and the public road run parallel but the railroad tracks are some twelve to fifteen feet higher than the public road and in approaching the said public road crossing at which her said husband was killed the embankment or approach is very steep and the railroad tracks are immediately at the top of the embankment and it was not possible in the exercise of ordinary care and diligence to observe the condition of the crossing until the truck was on the said crossing nor to see any engine or other thing approaching from the north as the train was on this occasion until one got upon the crossing.

6. Petitioner further shows that when her said husband was attempting to cross said public road crossing the front wheels mounted the first rail but went into the excavations between the cross-ties and struck the next rail which also being exposed as aforesaid stopped the truck and the en-
[fol. 64] gine of said truck was killed and the locomotive and train of said defendant ran upon the said truck with such power and momentum that it knocked the said truck some seventy to seventy-five feet down the railroad track killing petitioner's said husband instantly. Said engine was being operated at a dangerous and reckless rate of speed, to wit, forty miles per hour.

7. That said defendant railroad company, its agents and employees in charge of said engine were negligent in that when the engineer operating the locomotive engine of said railroad train reached the blow post failed to give the signal of approach to said public road crossing, that is to blow through the whistle two long and two short blasts at inter-

vals of five seconds apart and between each blast loud and distinct. That, in fact, the engineer operating said engine failed to give any warning or signal of the approach to said public road crossing. This was negligence.

8. Petitioner further shows that the engineer operating the said engine which killed petitioner's said husband was further negligence in that after reaching the blow-post furtherest removed from said public road crossing, and while approaching said crossing, said engineer failed to keep and maintain a constant and vigilant lookout along the track ahead of said engine, and failed to exercise due care in approaching said crossing so as to see your petitioner's said husband and if he had done so he could have avoided the killing of the said husband of your petitioner. All of which said acts and failure to act on the part of the said defendant, its servants and employees of said defendant in charge of and operating said train and engine constitute negligence and want of ordinary care and caused the death of her said husband and the damages to your petitioner.

[fol. 65] 9. Your petitioner further shows to the defendant was further negligent and wanting in ordinary care in that after its servants in charge of the said train and especially the engineer operating the engine and the foreman saw the predicament in which her said husband was at the said crossing failed to check the speed of the said train and failed to stop the same or to make any effort whatever to do so but, on the contrary, accelerated the speed of said train and ran the said engine and train upon her said husband with such great and reckless rate of speed, that it knocked the large and heavy truck some seventy five feet down the tracks of railroad and knocking her said husband the same distance and the said train ran on about its length after coming in contact with the said heavy two ton truck. The said servants in charge of the said engine made no effort to avoid the killing of her said husband but was grossly careless and negligent in the acts and failures to act in this behalf.

10. Your petitioner's husband was free from fault. He was 38 years of age and had a reasonable expectancy of 30 years. He was able bodied and was capable of earning the sum of three thousand dollars per annum.

11. That defendant was negligent and careless in failing to maintain and keep its track where the public road crossed in proper condition and repair. (b) In removing the dirt and ballast from the said tracks and leaving the cross-ties and railroad rails exposed and dangerous as hereinbefore set out. (c) In failing to give warning and signal of the approach of the train by blasts of the whistle and provided by law and as heretofore set forth. (d) In failing to keep a lookout after reaching the furtherest blow-post as prescribed by law. (e) In failing to check the speed of the [fol. 66] train after seeing plaintiff's husband crossing and on the tracks. (f) In accelerating the speed of the train or engine and running into the said truck and killing her said husband. (g) In running at such great and dangerous rate of speed as heretofore mentioned and alleged upon and over the said public road crossing in said county. (h) In failing to stop the engine after the danger was apparent to the employees in charge of the engine. (i) In not having the engine under control in approaching the said crossing. All of which said acts and failures to act contributed to and wholly caused the said death of her said husband, who was in the exercise of all ordinary care and diligence.

Wherefore petitioner prays that process may issue directed to the said defendant requiring it to be and appear at the next term of the superior court to be held in and for said county to answer your petitioner's complaint. That she have a verdict and judgment for the amount of her damages aforesaid.

W. E. Mann, Gordon Mann, Plaintiff's Attorneys.

Summons and sheriff's return omitted in printing.

[fol. 67] [File endorsement omitted.]

IN SUPERIOR COURT OF WHITFIELD COUNTY

No. 19, October Term, 1924

MRS. MARY E. HENDERSON

vs.

WESTERN & ATLANTIC RAILROAD CO.

ANSWER—Filed Oct. 4, 1924

Now comes defendant at the first term of court and answers one petition in above stated case as follows:

1. Defendant admits paragraphs 1 and 3 of plaintiff's petition.

2. Defendant denies paragraphs 2, 4, 5, 6, 7, 8, 9, 10, and 11 of plaintiff's petition.

Sam P. Maddox, Tye, Peeples & Tye, Defendant's Attorneys.

[File endorsement omitted.]

[fol. 68] IN SUPERIOR COURT OF WHITFIELD COUNTY

[Title omitted]

AMENDMENT TO DECLARATION—Filed Oct. 12, 1926

And now comes the plaintiff, by leave of the court first had and obtained, amends her declaration and for further and additional acts and negligence in that behalf shows to the court that said defendant was further negligent in that on the said 4th day of August, 1924, at the time of the killing of her said husband the said engineer, John Collum's eyes were in a very bad condition, he was very near sighted in both eyes and in fact about blind in one of his eyes—this condition had existed for a long time prior to the killing of her said husband at least for two years and grew worse and worse until the death of her said husband by the negligence of the said defendant railroad and very soon

after the said killing of her said husband the said defendant Western & Atlantic Railroad ceased to allow the said engineer to run said engine and he has been off said railroad as employee ever since but it was too late to prevent the death of her said husband as set out in her said original petition and in this amendment by the further negligence of running of its engine and trains in the control of a practically blind engineer at the throttle of the engine.

Wm. E. Mann & W. Gordon Mann, Attorneys for Petitioner.

Amendment allowed this 12th day of October, 1926. M. C. Tarver, Judge Superior Courts, Cherokee Circuit.

[File endorsement omitted.]

[fol. 69] In Superior Court of Whitfield County

[Title omitted]

Amendment to Answer—Filed Oct. 12, 1926

And now comes the defendant by leave of the court first had and obtained and amends its answer and for further answer says:

1. That the accident was caused by deceased's negligence solely.

2. That deceased was not in the exercise of ordinary care at the time of the accident.

3. That deceased at the time of the accident was guilty of negligence which contributed approximately to his death.

Tye, Peeples & Tye, Neel & Neel, Maddox, Maddox & Mitchell, Attorneys for Defendant.

Amendment allowed this 12th day of October, 1926. M. C. Tarver, J. S. C. C.

[File endorsement omitted.]

[fol. 70] In Superior Court of Whitfield County

[Title omitted]

Petition for Intervention—Filed April 4, 1925

Now comes the Maryland Casualty Company, an insurance corporation, operating in, and licensed to transact the business of workmen's compensation insurance in said State and county, and by leave of the court files its intervention in said case, and says:

1st. That J. C. Henderson, the husband of Mrs. Mary E. Henderson, and for whose death at the hands of the defendant named herein the plaintiff is seeking to recover damages, was at the time of his injury and death employed by Coca Cola Bottling Company of Dalton, Georgia, and the death of the said J. C. Henderson was caused by an injury arising out of and in the course of his employment with said Coca Cola Bottling Company.

2nd. That the said Coca Cola Bottling Company as an employer and the said J. C. Henderson as employee had accepted the provisions of the Georgia Workmen's Compensation Act.

3d. The said Coca Cola Bottling Company after the acceptance of the provisions of the Georgia Workmen's Compensation Act by itself and its employee J. C. Henderson, fully insured its liability under said Georgia Workmen's Compensation Act by a policy of insurance written by said Maryland Casualty Company, under and by virtue of which policy of insurance said Maryland Casualty Company became liable for the payment of any and all awards to which the employees of said Coca Cola Bottling Company were or might become entitled under the provisions of the Georgia Workmen's Compensation Act.

4th. At the time of the death of the said J. C. Henderson, the said policy was in force, the said Coca Cola Bottling [fol. 71] Company was fully protected under the terms of said policy, and the Maryland Casualty Company was liable to the beneficiaries of said J. C. Henderson for the amount of any award that the Industrial Commission of Georgia

might grant to said beneficiaries by reason of the death of said J. C. Henderson.

5th. After due investigation of the circumstances of the death of the said J. C. Henderson it was determined that he was engaged in the course of his employment with the said Coca Cola Bottling Company.

6th. The Maryland Casualty Company had admitted its liability to Mrs. Mary E. Henderson, the widow of the said J. C. Henderson, and by agreement with the said beneficiary intervenor has agreed to pay and the beneficiary had agreed to accept in full settlement of intervenor's liability in said case the sum of $12.75 a week for three hundred weeks and the further sum of $100 for burial expenses and undertakers services for conducting the funeral of the deceased J. C. Henderson.

7th. The Industrial Commission of Georgia, by order dated October 4, 1924, approved the agreement between Maryland Casualty Company, the intervenor, representing the Coca Cola Bottling Company, the employer, and Mrs. Mary E. Henderson, the beneficiary of J. C. Henderson, deceased.

8th. Intervenor has made payments under said agreement and award of $12.75 a week for thirty-five weeks which payments began August 4, 1924, and continued to April 4, 1925, and intervenor has paid the further sum of $100.00 for burial expenses and undertakers services under said agreement and award, making total payments to date under said agreement and award of $546.25.

9th. Under the action for damages brought by the said Mrs. Mary E. Henderson against Western and Atlantic Railroad in which this intervention is filed it is set forth [fol. 72] that the death of the said J. C. Henderson was caused by an injury arising under circumstances creating a legal liability in said Western and Atlantic Railroad to pay damages in respect thereto.

Wherefore intervenor prays:

(a) That it may be allowed to become a party to said case and that its rights and liabilities may be fully determined therein.

(b) That Mrs. Mary E. Henderson, plaintiff, and Western and Atlantic Railroad, defendant, be required to show cause why intervenor's rights and liabilities in said matter should not be so determined.

(c) If upon the final determination of said case it is established that the death of the said J. C. Henderson was caused under circumstances creating a legal liability in said Western and Atlantic Railroad to pay damages in respect thereto, that intervenor be indemnified by said Western and Atlantic Railroad to the full amount of the compensation heretofore paid by intervenor under the agreement and award as above set out, and that intervenor be subrogated to the rights of the said Mrs. *Mrs.* Mary E. Henderson to recover from said Western and Atlantic Railroad to the extent of the payments so made by intervenor.

(d) That by proper decree intervenor be relieved from making further payments under said agreement and approval of agreement by the Industrial Commission of Georgia and that intervenor be discharged from further liability in said matter.

(e) That intervenor may be granted such other and further relief as may to the court seem meet and proper.

J. A. McFarland, Attorney for Intervenor.

[fol. 73] *Duly sworn to by F. A. Pruden. Jurat omitted in printing.*

STATE OF GEORGIA,
Whitfield County:

Office of the Judge of the Superior Court, Dalton, Georgia

The above and foregoing intervention read and considered. Let the same be filed, and let the plaintiff and defendant in said case show cause, if any they have or can, before me on the 18th day of April, 1925, or so soon thereafter as counsel can be heard, why the rights of the intervener should not be determined in said case.

This 4th day of April, 1925.

M. C. Tarver, Judge Superior Courts, Cherokee Circuit.

GEORGIA,
Whitfield County:

The above and foregoing matter coming on for a hearing and no valid objection to the determination of intervener's rights in said case being presented, it is considered, ordered and adjudged that intervener be made a party plaintiff in said case and that on the final hearing of said case intervener's rights and liabilities be determined.

[fol. 74] This 18th day of April, 1925.

M. C. Tarver, J. S. C. C. C.

STATE OF GEORGIA,
Whitfield County:

Service on the within and foregoing intervention and order is hereby acknowledged. Copy, process and all other and further service and notice is hereby expressly waive-.

This 6th day of April, 1925.

W. E. Mann, Attorney for Mrs. Mary E. Henderson.

STATE OF GEORGIA,
Whitfield County:

Service on the within and foregoing intervention and order is hereby acknowledged. Copy, Process, and all other and further service and notice is hereby expressly waived.

This 6th day of April, 1925.

Neel & Neel, Maddox, Maddox & Mitchell.

[File endorsement omitted.]

[fol. 75] IN SUPERIOR COURT OF WHITFIELD COUNTY

[Title omitted]

ANSWER TO PETITION FOR INTERVENTION—Filed April 15, 1925

Now comes the defendant, Western & Atlantic Railroad, and in response to the allegations of the petition of the intervenor, and to the order of court calling upon it to show cause as to said intervention, says:

1. For lack of sufficient information it can neither admit nor deny the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of said intervention.

2. Answering paragraph 9 of said intervention defendant says:

It admits that it is alleged in the action for damages brought by Mrs. Mary E. Henderson against it that the death of said J. C. Henderson was caused by an injury arising under circumstances creating a legal liability in defendant to pay damages in respect thereto, but it alleges that the allegations made in said petition tending to show any such liability on the part of this defendant are untrue and that in point of fact under the law this defendant is not liable in damages to plaintiff in said suit.

Wherefore, having fully answered it prays that such order be made in the case so far as the rights of the intervenor may be concerned which may be authorized by law and that upon the trial of the cause it be discharged from any liability either to plaintiff or the intervenor.

Neel & Neel, Sam P. Maddox, Tye, Peeples & Tye.

[fol. 76] *Duly sworn to by J. A. Baldwin. Jurat omitted in printing.*

[File endorsement omitted.]

GEORGIA,
Whitfield County:

The above and foregoing matter coming on for a hearing and no valid objection to the determination of intervenor's rights in said case being presented, it is considered, ordered and adjudged that intervenor be made a party plaintiff in said case and that on the final hearing of said case intervenor's rights and liabilities be determined.

This 18th day of April, 1925.

M. C. Tarver, J. S. C. C. C.

[fol. 77] In Superior Court of Whitfield County

[Title omitted]

Amendment to Intervenor's Petition—Filed Oct. 12, 1926

Now comes the Maryland Casualty Company, intervenor, and amends its petition as follows:

Since the filing of the intervention and since the filing of our amendment thereto on the 12th day of October, 1925, intervenor has made additional payments of the $12.75 a week for 52 weeks making total payments to date to widow and child of J. C. Henderson, the plaintiff herein, $1,553.50.

Wherefore intervenor prays to be subrogated to the rights of the plaintiff in said matter to the amount of $1,-553.50, and further payments as made:

This 12th day of October, 1926.

J. A. McFarland, Attorney for Intervenor.

Amendment alllowed this 12th day of October, 1926. M. C. Tarver, J. S. C. C. C.

[File endorsement omitted.]

[fol. 78] In Superior Court of Whitfield County

Verdict

We, the jury, find a verdict for the plaintiff for the sum of $15,000.00, Fifteen Thousand Dollars. Also in favor of the Maryland Casualty Co.

This 13th day of Oct. 1926.

W. H. Love, Foreman.

In Superior Court of Whitfield County

Judgment

Whereupon, it is considered, ordered and adjudged by the court that the plaintiff, Mrs. Mary E. Henderson, do have

and recover of the defendant Western and Atlantic Railroad, fifteen thousand dollars ($15,000.00) and costs.

Ordered further that the intervenor Maryland Casualty Company, be subrogated to the rights of the plaintiff to the amount of fifteen hundred fifty-three and 50/100 ($1,553.50) dollars out of the amount recovered by the plaintiff against the defendant and in addition to the said Maryland Casualty Company being subrogated to the amount of $1,553.50 for payments heretofore made to the said Mrs. Mary E. Henderson under the agreement and award under the Georgia Workmen's Compensation Law, that said Maryland Casualty Company be subrogated to the rights of the said Mrs. Mary E. Henderson to recover out of the judgment of the plaintiff against the defendant to the full amount of any future payments to be made by said Maryland Casualty Company to the said Mrs. Mary E. Henderson under the agreement and award under the Georgia Workmen's — Law for the death of her husband, J. C. Henderson.

This 13th day of October, 1926.

M. C. Tarver, J. S. C. C. C. Wm. E. Mann, W. Gordon Mann, Attorneys for Plaintiff. J. A. McFarland, Attorney for Intervenor.

[fol. 79] Superior Court of Whitfield County, Georgia, October Term, 1924

No. 19

Mrs. Mary E. Henderson, Plaintiff, and The Maryland Casualty Company, Intervenor,

vs.

Western and Atlantic Railroad, Defendant

Verdict and Judgment for Plaintiff and Intervenor at October Term, 1926, of Whitfield Superior Court on Thirteenth Day of October, 1926

Motion for New Trial

The defendant, being dissatisfied with the verdict and judgment in said case, comes during said term of court, before the adjournment thereof, and within 30 days from

said trial, and moves the court for a new trial, upon the following grounds, to wit:

1st. Because the verdict is contrary to evidence and without evidence to support it.

2nd. Because the verdict is decidedly and strongly against the weight of evidence.

3rd. Because the verdict is contrary to law and the principles of justice and equity.

Whereupon he prays that these, his grounds for a new trial, be inquired of by the court, and that a new trial be granted him.

Tye, Peeples & Tye, Maddox, Maddox and Mitchell, Neel & Neel, Attorneys for Movant.

Read and considered. It is ordered that the plaintiff, Mrs. Mary E. Henderson and Maryland Casualty Company, Intervenor, show cause before me at Dalton, at one o'clock P. M. on the 4th day of December, 1926 why the foregoing motion should not be granted. It is further ordered that the plaintiff, Mrs. Mary E. Henderson and Intervenor, The Maryland Casualty Co., be served with a copy of this motion and order; and that this order act as a supersedeas until the further order of the court.

The 15th day of October, 1926.

M. C. Tarver, Judge of S. C. C. C.

Mrs. Mary E. Henderson, Plaintiff, and The Maryland Casualty Co., Intervenor,

vs.

Western & Atlantic Railroad, Defendant

Verdict and Judgment for Plaintiff and Intervenor October Term, 1926, of Superior Court, Whitfield County, Georgia

This defendant, having made a motion for a new trial in said case, on the grounds therein stated, and said grounds having been approved by the court, and it appearing that it is impossible to make out and complete a brief of the testimony on said case before adjournment of court; it is ordered by the court that said motion be heard and deter-

mined on the 4th day of December, 1926, in vacation, at Dalton, Ga., and that movant may amend said motion at any time before the final hearing.

If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and upon failure to agree, then at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice.

If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term or thereafter.

It is further ordered that the movant have until the hearing, whenever it may be, to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined.

This 15th day of October, 1926.

M. C. Tarver, Judge of S. C. C. C.

[fol. 80] Oct. Term, 1926

The motion after hearing is overruled and a new trial refused.

In open court this the 11th day of December, 1926.

M. C. Tarver, Judge.

Filed in office Oct. 15th, 1926. M. Westbrook, C. S. C.

Due and Legal service of the within motion and order acknowledged, time, copy, and all other and further service waived.

This 15th day of October, 1926.

Wm. Mann, W. Gordon Mann, Attorneys for Plaintiff, Mrs. Mary E. Henderson. J. A. McFarland, Attorney for Intervenor, Maryland Casualty Company.

Oct. Term.

[Endorsed:] No. 16, Oct. Term, 1926. In Whitfield Superior Court. Motion for new trial. Mary E. Henderson vs. W. & A. R. R. Filed in office this 15th day of Oct., 1926. M. Westbrook, Clerk.

[fol. 81] In Superior Court of Whitfield County

[Title omitted]

Amendment to Motion for New Trial and Order Allowing Amendment—Filed Dec. 11, 1926

And now comes the Western and Atlantic Railroad, defendant in said case and movant for new trial therein and amends its motion for new trial by adding thereto the following additional grounds upon which it says a new trial should be granted in said case. Said grounds being as follows:

4. Because the verdict of fifteen thousand dollars awarded by the jury to the plaintiff, Mary E. Henderson, is excessive, for the reason that even if the jury found that the lack of ordinary care on the part of defendant's employees in some one or more of the particulars specified in plaintiff's petition, caused the death of plaintiff's husband, and that he could not by the exercise of ordinary care have avoided the consequences to himself caused by such negligence of defendant's employees (movant not admitting but denying that the evidence supported such a finding) yet movant insists that the uncontradicted evidence at least required a finding by the jury that plaintiff's husband was negligent to an extent but little less in degree than a lack of ordinary care on his part in failing to avoid injury to himself from such negligence of defendant's employees, it appearing from the uncontradicted evidence in said case, as movant insists, that plaintiff's said husband on the occasion in question just before the collision occurred which resulted in his death, was driving his truck along the highway towards defendant's main track on the crossing in [fol. 82] question, having a clear and unobstructed view of the near and rapidly approaching train of defendant on said main track of defendant towards said crossing which

approaching train was within the unobstructed view of plaintiff's said husband during the last forty feet and more of his approach to defendant's main track on said crossing, the engineer of said train having blown the crossing signals for said crossing as required by law and approaching said crossing at the rate of about thirty miles per hour, while palintiff's said husband was driving his truck towards defendant's main track on said crossing at the rate of about 8 or 10 miles per hour, the front of the locomotive of said train being within less than 200 feet of said crossing, when the truck driven by plaintiff's husband reached a point on said highway a little over 40 feet from said main track without any obstruction to his view of the near approaching train at any point on said highway over which he drove his truck during the last 40 feet of his approach to said main track, it not appearing from the evidence, as movant insists, that any fact or circumstance occurred during said last 40 feet of his approach to said main track to distract or divert his attention from using his sense of sight, and hearing in observing the said near and rapid approach of said train to said crossing, except the suggestion or surmise that the noise made by his truck might have prevented him from hearing said crossing signals; it further appearing from the uncontradicted evidence, as movant insists, that plaintiff's said husband under such circumstances attempted to cross defendant's main track on said crossing ahead of defendant's said fast and near approaching train, the front of which reached said crossing just as plaintiff's said husband was driving the front of his truck over the west rail of said main track, and the collision of [fol. 83] the train with the truck occurred instantly causing the death of plaintiff's said husband, it further appearing from the uncontradicted evidence, as movant insists, that defendant's engineer operating said locomotive, while approaching said crossing, was keeping a constant vigilant lookout along the track ahead of his engine and did not discover the presence of plaintiff's said husband and his truck until the front of said truck was within about fifteen feet of the west rail of said main track, the front of defendant's said locomotive being then about 90 or 100 feet from said crossing and then approaching the crossing at the rate of about 30 miles per hour. If for any reason,

the court should hold that the evidence before the jury was not sufficient to demand a finding by the jury that the death of plaintiff's husband was caused by his own negligence, or by his failure to exercise ordinary care to avoid the consequences to himself of any negligence of defendant's employees specified in plaintiff's petition, then movant insists that the uncontradicted evidence in said case at least demanded a finding by the jury that there was such degree of negligence on the part of plaintiff's husband in the particulars hereinbefore specified in this ground of the motion, operating as a contributing cause of his death, as to require the application of the doctrine of comparative negligence reducing the amount of plaintiff's recovery in proportion to the amount of default attributable to her said husband in the occurrence of the collision which caused his death, and movant insists that under any possible view of the evidence, the amount of default attributable to said plaintiff's husband could not be less than 49% of the aggregate default attributable to him and to defendant's employees in the occurrence of the collision causing the death of plaintiff's said husband.

[fol. 84] The jury awarded the plaintiff a verdict for $15,000.00. The evidence showed the age of her husband at the time of his death to be a little over 38 years. The Carlisle Mortality Table introduced in evidence by plaintiff showed the life expectancy of an average person at the age of 38 years to be 28 and 96/100 years. The evidence as movant insists shows that plaintiff's husband was earning $130 per month at the time of his death so that if he lost no time from his work his annual capacity would have been $1,560.00. Making only a small allowance for reduction of the average annual value of the future earning capacity for plaintiff's husband for the years of his life expectancy, had he not been killed, on account of lost time from future illness, or accident, or infirmities and impairment of health due to increasing age and other causes, the difficulty of securing constant employment at wages as remunerative as he was receiving at and before he was *receiving of and before he was* killed, it is manifest as movant insists, that the jury by their verdict allowed her an amount for damages fully equal to if not in excess of the full pecuniary value of the life of her said husband, without any

deduction whatever therefrom on account of the comparative negligence of her said husband, which reduction movant insists was demanded by the evidence to the extent of at least 49% of the full damages awarded to plaintiff by the jury.

For the foregoing reasons movant insists that the verdict was grossly excessive and that a new trial should be granted therefor.

5. Because the court erred in refusing to give in charge to the jury the following written instruction as requested in writing by movant's counsel on the trial before the court began his charge to the jury, said requested instruction being as follows, to wit:

[fol. 85] "If you find from the evidence that the condition of the crossing did not proximately contribute to the striking of the truck in which Mr. Henderson was riding, then you would not consider the condition of the crossing in arriving at a verdict in this case. In other words if the crossing had been in good condition and you find that the truck would nevertheless have been struck by the engine you would if you so find, not consider the condition of the crossing."

Movant insists that said charge was correct, and applicable to a material issue in said case, to wit, whether the alleged defective crossing was a proximately contributing cause of the alleged collision which killed said deceased, and the refusal to give said instruction was harmful to defendant and constitutes reversible error.

Note by Court.—I do not certify that the principal stated in this request was not covered in other language in the charge.

6. Because the court erred in refusing to give in charge to the jury the following written instruction as requested in writing by movant's counsel on the trial of said case befor the court began his charge to the jury, said instruction being as follows:

"If the presumption of negligence arising in this case is overcome by the train crew—the eye witnesses, I charge you that the mere differences of opinion of the witnesses

as to time, distances, range of vision, does not involve questions of credibility or produce conflict as to the actual facts of the occurrence as testified to by the eye witnesses."

Movant insists that said instruction was erroneously refused because the only eye witnesses to the occurrence of the collision which killed the deceased husband of the plaintiff were the members of the train crew operating the de-[fol. 86] fendant's train at the time of the collision, and who testified, as movant insists, that deceased when first seen by them, was driving his truck toward the crossing, the front of it just entering upon the west side of side track, the east rail of which was about 8 feet from west rail of main track on which said train was approaching at a rate of 30 or 35 miles per hour, the front of the engine then being about 90 to 100 feet from the crossing, and that deceased continued towards the track and the collision occurred almost instantly about the time the front wheels of the truck crossed over the west rail of main track. There were only some slight variations, as movant insists, in the testimony of these witnesses in their estimates of time, distance and range of vision, the existence of which slight differences of opinion by said witnesses on such matters of estimate would not in law be ground for attacking their credibility nor amount to material conflict between said witnesses as to the actual facts of the occur-ence testified to by them.

Movant insists that said instruction was a correct and proper charge to be given to the jury touching the proper legal rule to be observed by the jury in the consideration of the testimony of such eye witnesses in the mere matter of slight differences of opinion, or estimate of time, distance, or range of vision relative to the matters testified about and further insists that the refusal of the court to give said charge to the jury was error harmful to defendant and therefore reversible error.

7. Because the court erred in refusing to give in charge to the jury the following written instruction requested in writing by movant's counsel on the trial of said case before [fol. 87] the court began its charge to the jury. Said instruction being as follows:

"Although a presumption of negligence arises against the defendant if it appears from the evidence that plaintiff's deceased husband was killed by the running of defendant's locomotive or cars yet the defendant may defeat a recovery by plaintiff, by establishing either of the following defense:

1. That defendant and its employees exercised all ordinary and reasonable care and diligence to avoid the injury.

2. That the killing of plaintiff's deceased husband was proximately caused by his own negligence.

3. That the plaintiff's deceased husband, by the use of ordinary care, on his part, could and should have avoided the injury to himself although caused by the negligence of defendant or its employees.

4. That if both the plaintiff's deceased husband and defendant's employees were negligent in causing the death of said deceased, the negligence of said deceased was equal to or greater than the negligence of defendant and its employees.

The court instructs the jury that if defendant establishes by a preponderance of the evidence, either of said four defenses the plaintiff would not be entitled to recover any damages of defendant."

Movant insists that the court erred in refusing to give said instruction in charge to the jury because the same was a correct and appropriate instruction, and was material and necessary in view of the fact that the court on its own motion, after stating to the jury the contention of the parties, immediately charged them as follows: to wit:

"I charge you that, when it has been made to appear that [fol. 88] injury or damage has ocurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for recovery of

damages by reason of such injury, would be entitled to recover." which charge of the court allowed defendant only one defense against recovery by plaintiff in the event it appeared to the jury that plaintiff's deceased husband was killed by the operation of the locomotive and train of defendant, and that the sole defense thereto allowed was for defendant to show by a preponderance of the evidence that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and that unless defendant did so the plaintiff would be entitled to recover.

Movant insists that the tendency and effect of said instruction by the court was to create the impression on the jury that the only defense which defendant could make against plaintiff's right of recovery if she proved that her husband was killed by the operation of defendant's train, was for defendant to assume the burden of showing by the preponderance of the evidence that its emlpoyees were without negligence in any of the particulars alleged in plaintiff's petition, and the court's said charge being so understood by the jury would have been erroneous and movant insists that there was and is grave danger that the jury did so under-[fol. 89] stand the same and were erroneously misled by it.

For these reasons movant insists that the above requested charge was a correct, appropriate and necessary instruction to the jury to cause them to clearly understand that the presumption of negligence arising against defendant upon mere proof of the killing of plaintiff's husband by the operation of defendant's train and the right of plaintiff to recover on such presumption instead of being subject to be defeated only by the one defense named in the above quoted instruction of the court, was subject to be defeated by either one of three other defenses above stated if defendant should establish either of said other defenses by a preponderance of the evidence.

For all of the foregoing reasons movant says the refusal of the court to charge said requested instruction was materially harmful to defendant and was reversible error.

Note by the Court.—I do not certify that the principles covered by this request were not in fact covered by the charge.

8. Because the court erred in refusing to give in charge to the jury the following written instruction requested in writing by movant's counsel on the trial of said case before the court began its charge to the jury, said instruction being as follows:

"If there were any obstructions to the sight or hearing of plaintiff in the direction of the approaching train, as the plaintiff neared the crossing, the obstructions required increased care on the part of the plaintiff on approaching the crossing. In such case the care must be in proportion to the increase of the danger that may come from the use of the highway at such a place."

Movant insists that said instruction was a correct and [fol. 90] appropriate charge on a material issue in said case, and that the refusal of the court to give the same in charge to the jury was hurtful and reversible error against movant for which a new trial should be granted.

NOTE BY THE COURT.—The court does not certify that the principles contained in this request, are not covered by the charge.

9. Because the court erred in refusing to give in charge to the jury the following written instruction requested in writing by movant's counsel on the trial of said case before the court began its charge to the jury, said instruction being as follows:

"It is the duty of a traveler approaching a railroad crossing to look and listen for approaching trains wherever an opportunity of seeing or hearing such trains presents itself; if an ordinarily prudent person would so look and listen; and although he may look and listen, or look and listen at a point where there are obstructions to the sight or hearing, if he subsequently reached a point where an approaching train can be seen or heard before entering on such crossing it is his duty to look and listen again before entering on such crossing, and his failure to do so would be such negligence as would bar a recovery for his injury, provided an ordinarily prudent person would have looked and listened at such point or points."

Movant insists that said requested instruction was a correct and appropriate charge on a material issue in said case, and that the refusal of the court to charge the same to the jury was harmful and reversible error against movant for which a new trial should be granted.

NOTE BY THE COURT.—I do not certify that the principles of this request were not covered by the charge.

[fol. 91] 10. Because the court erred in refusing to give in charge to the jury the following written instruction requested in writing by movant's counsel on the trial of said case before the court began its charge to the jury, said instruction being as follows:

"Where the view or hearing of a traveler approaching a railroad crossing is obstructed, he is under the duty of using greater care and prudence in looking and listening for approaching trains than where there is no obstruction, the degree of care which he must exercise in such a case, particularly where he is familiar with the crossing, must be in proportion to the increase of danger and must be such care and prudence in looking and listening as an ordinarily prudent man would exercise under like circumstances of obstruction of view or hearing; and if he fails to use such care whereby he is injured, he is guilty of contributory negligence barring any right of recovery."

Movant insists that said requested instruction was a correct and appropriate charge on a material issue in said case, and that the refusal of the court to charge the same to the jury was harmful and reversible error against movant, for which a new trial should be granted.

NOTE BY THE COURT.—I do not certify that the principles contained in this request were not in fact covered by the charge.

11. Because the court erred in refusing to give in charge to the jury the following written instruction requested in writing by movant's counsel on the trial of said case before the court began its charge to the jury, said instruction being as follows:

"If you believe from the evidence that the deceased was well acquainted with the crossing and the highway leading thereto, and further believe from the evidence that at a [fol. 92] point in said highway 40 or more feet from the crossing he could have looked and seen the approaching train from that point and that an ordinarily prudent person would have looked from such point and could, by stopping his automobile before entering on the railroad track, have avoided the collision and injury therefrom by the exercise of ordinary care, then I charge you that plaintiff cannot recover on this."

Movant insists that said instruction was a correct and appropriate charge on a material issue in said case, and that the refusal of the court to give the same in charge to the jury was hurtful and reversible error against movant for which a new trial should be granted.

12. Because the court erred in charging the jury that defendant contended that the eyesight of its engineer, who was operating the train at the time of the collision was not defective, which was as movant insists an inaccurate statement of defendant's contention, in that defendant did not deny that the eyesight of said engineer was defective to the extent that he was to some extent nearsighted, but that this defect was fully overcome by eye-glasses which he was using at the time, which enabled him to see objects at a distance as well as he could have done with his natural eyes had they not been defective in the particular above mentioned. Movant insists that said inaccurate statement by the court of defendant's contention aforesaid, placed it in the attitude of denying before the jury any defect whatsoever of the eyes of its said engineer, instead of its real contention that although said engineer was somewhat near sighted, yet that this defect was fully supplied and overcome by eyeglasses then worn by him which enabled him to see objects at a distance as well as he could have done with his natural eyes had they not been defective. This error [fol. 93] was harmful to defendant on a material issue in the case and was reversible error.

13. The court charged the jury as follows, to wit:

"I give you in charge Section 2677 (b) of the Code of this State: Upon the line of each railway in this State, and

at a point four hundred yards from the center of its intersection at grade with any public road or street used by the public generally in crossing the tracks of said railway, and on each side of said crossing, there shall be erected by the railroad company, persons or corporations owning and operating said railway, a blow-post to indicate the direction of such crossing, and the engineer operating the locomotive engine of any railroad train moving over the track of said railroad shall be and he is hereby required when he reaches the said blow-post, as a signal of approach to said crossing, to blow through said whistle two long and two short blasts at intervals of five seconds between each blast, said blasts to be loud and distinct. In addition thereto, after reaching the blow-post furtherest removed from said crossing, and while approaching said crossing, he shall keep and maintain a constant and vigilant lookout along the track ahead of said engine, and shall otherwise exercise due care in approaching said crossing, in order to avoid injury to any person or property which may be on such crossing, or upon the line of said railway at any point within fifty feet of such crossing."

Movant insists that the court, after having charged the foregoing Code Section 2677 (b) erred in thereafter charging the jury as follows, to wit:

"I charge you that due care as referred to in the section of the code just read in your hearing, has reference to ordinary care. Whatever ordinary care required in the opera-[fol. 94] tion of his engine, that the engineer should have done.

I charge you, if at the time of the alleged homicide, the engineer in charge of the locomotive of the defendant railroad was guilty of a violation of either of the provisions of the section of the code which has just been read in your hearing, and such violation is charged in the plaintiff's petition, and you further find that the injury or death of the plaintiff's husband resulted by reason of a violation of the section of the code just read in your hearing, as may have been specified in the plaintiff's petition, and you further find that the plaintiffs' husband could not have by the exercise of ordinary care for his own safety avoided the consequences to himself of such negligent act on the part of

the defendant company's engineer, then the plaintiff in this case would be entitled to recover."

Movant insists that said charge was erroneous in the following particulars, to wit:

a. Movant insists it was conclusively shown by the uncontradicted evidence before the jury, that the engineer operating defendant's locomotive in approaching the crossing in question on the occasion referred to fully complied with the requirements of section 2677 (b) of the Code of Georgia as to the blowing signals for said crossing as he approached the same.

In view of what movant insists was the uncontradicted evidence as to the compliance by said engineer with the requirements of said code section in the particular above mentioned, movant insists that the last above quoted charge given by the court was error in that the same submitted to the jury as a disputed issue to be passed upon by them the question as to whether the engineer aforesaid did or did not blow the crossing signals for the crossing in question [fol. 95] on the occasion referred to as required by said code section. Movant insists that there was no evidence to support said charge in favor of plaintiff's contention, that defendant's engineer had violated said Code Section 2677 (b) in the particular above mentioned as to blowing the crossing signals for said crossing, and that said charge was calculated to mislead the jury into erroneous assumption or supposition that there was evidence to support plaintiff's contention in the particular above mentioned, and to erroneously find in favor of plaintiff's said contention in said particular and against defendant. Movant insists that the last quoted charge referred to affirmatively instructed the jury that the plaintiff in this case would be entitled to recover if the engineer in charge of said locomotive had failed to blow the whistle as required by Code Section 2677 (b) when the evidence affirmatively showed without any contradiction whatever, as movant insists that said Section 2677 (b) was exactly complied with in regard to the blowing of the signals, and the blowing of such signals was not an issuable matter to be passed upon by the jury and the court erred in submitting that question to the jury and making it a basis upon which the jury could hold the defendant com-

pany liable. For which reasons movant says that hurtful and reversible error was committed by the court in giving said charge and that a new trial should therefore be granted by the court.

14. "I charge you that when it has been made to appear that any injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees have exercised ordinary care and diligence in the [fol. 96] particulars wherein they are alleged to have been negligent."

erred in thereupon immediately charging the jury as the concluding clause to the above quoted instruction the following additional quoted instruction, to wit:

"And unless it does so, the fact the injury or damage having been made to appear, the plaintiff suing for recovery of damages, would be entitled to recover."

Movant says and insists that said last above quoted instruction was error for the following reasons:

a. By the use of the language "and unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury would be entitled to recover," the court directed the jury that the plaintiff would be entitled to recover on any allegation of negligence in the petition unless as to such allegation the defendant had shown that its employees exercised ordinary care and diligence in that particular without regard to whether such alleged negligence did or did not proximately cause or contribute to the injury. Movant insists that the court erred in not limiting such instruction by appropriate language which would permit a recovery by plaintiff only on the allegations of negligence which appeared to have proximately caused or contributed to the injury. By the instruction complained of movant insists that the court extended the presumption of negligence to the extent of also presuming that such alleged negligence

proximately caused the injury complained of, whereas movant insists that the presumption only goes to the extent of presuming as negligent such acts as are alleged in plaintiff's petition to be negligent, and that the burden is upon the plaintiff to show by evidence or circumstances that the alleged negligent act proximately caused or contributed to [fol. 97] the injury. Movant insists that the charge complained of was especially hurtful in this case because plaintiff had alleged that the crossing was in bad repair and had produced evidence that the crossing was in bad repair, and movant had insisted that even if the crossing was in bad repair that such bad repair in no way caused or contributed to the injury, and had as movant insists, proved by witnesses that the truck came on the crossing so closely in front of the engine that it would have been struck regardless of the condition of the crossing. Movant insists that by the charge complained of the court authorized the jury to find a verdict in favor of plaintiff on acount of the bad condition, even though such condition in no way caused or contributed to the injury. Movant further insists that by the charge complained of the court relieved the plaintiff of showing by evidence that the acts alleged to be negligent acts caused or contributed to the injury, and permitted the jury to find in favor of the plai-tiff on an illegal presumption that such acts alleged as negligence proximately caused or contributed to the injury.

15. Because the court erred in refusing to give in charge to the jury the following written instruction in its entirety as requested in writing, by movant's counsel, on the trial of said case before the court began its charge to the jury, said instruction being as follows, to wit:

"I charge you that no person shall recover damages from the railroad company for injuries to a person where the same is caused by that person's own negligence. If the deceased and the agents of the defendant company are both at fault, the plaintiff may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him; but I charge you further in this [fol. 98] connection that if the deceased, by the exercise of ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, plaintiff cannot recover, nor can plaintiff recover any damage, unless the

amount of fault attributable to deceased is less than the amount of fault attributable to the employees of the defendant."

The court in charging said request erroneously omitted the first sentence of said requset which was as follows, to wit:

"I charge you that no person shall recover damages from a railroad company for injuries to a person where the same is caused by that person's negligence." and gave in charge to the jury only the subsequent portion of said request, and did not in immediate connection with the remaining portion of said request as given in charge by the court nor by reference thereto in any subsequent portion of its charge to the jury, instruct them as requested in the first sentence of said written request, either in the language of said sentence or in substance. Movant insists that the omission by the court of the first sentence of its said request from the above quoted instruction as given by the court, including therein only the remaining portion of said request and the failure of the court to charge said omitted sentence of said request to the jury either in immediate connection with the portion of said request charged by the court or in any such subsequent portion of said request charged by the court or in any such subsequent portion of the charge of the court to the jury, was hurtful error against movant for the following reasons, to wit:

a. Because one of the defendants leading grounds of defense was that the death of plaintiff's husband was caused by his own negligence in driving his truck along the highway [fol. 99] towards defendant's main track on the crossing in question with a clear and unobstructed view of the near and rapidly approaching train of defendant towards said crossing which approaching train was as movant contended, within the unobstructed view of plaintiff's said husband during the last forty feet and more of his approach to defendant's main track on said crossing, the engineer of said train having blown the crossing signals required by law, and approaching said crossing at the rate of 30 miles per hour, while plaintiff's said husband was driving his truck towards the track on said crossing at the rate of 8 or 10 miles per hour. Defendant's contention was that the un-

contradicted evidence showed that when plaintiff's said husband arrived at a point within 40 feet of defendant's main track, defendant's said train was already so near the crossing and moving at such speed as to make it extremely dangerous for plaintiff's said husband to attempt to drive his truck across said track in front of said rapidly approaching train when in such close proximity to the crossing, regardless of whether the crossing in question was in good repair or bad repair, movant contending that under the uncontradicted evidence the collision of the truck with the train was not caused by any defect in the crossing, but by reason of the sole fact that plaintiff's husband drove his truck on the track immediately in front of defendant's train when the front of the engine was right at the crossing so that the collision occurred instantly as the front wheels of the truck passed over the west rail of the track, and so quickly that it would have been impossible for plaintiff's husband to have his truck off of the track before the collision occurred even had the crossing been in perfect condition. Defendant insists that the court by eliminating the first sentence of said request, and giving in charge only the remainder there- [fol. 100] of erroneously gave in charge the latter portion only of Section 2781 of the Civil Code of Georgia and the first portion of Section 4426 of the Civil Code of Georgia, thus mingling the two parts of said Code Sections in such manner as to confuse the jury as to the proper application of the doctrine of comparative negligence and the apportionment of damages thereon and it was calculated to leave the jury in doubt and uncertainty as to whether they should or should not apply the doctrine of comparative negligence and apportionment of damages in the event it should appear from the evidence that the death of plaintiff's husband was caused by his own negligence.

Note by the Court.—I certify that in another portion of the charge I instructed the jury that the plaintiff could not recover if the death of deceased was caused by his own negligen*tly* as shown by the charge as certified herein.

Because the court erred in omitting as movant insists to charge the principle of Code Section 2781 as follows: "No person shall recover damages for injury to himself where the same is done by his own consent or is caused by his own

negligence." While the court did charge the principles of the latter part of this section of the code as follows: "If the complainant and the agents of the company are both at fault, the former may recover but the damages shall be diminished by the jury in proportion to the amount of default attributable to him," on page 8 of the charge of the court charged the jury as follows: "In other words, gentlemen of the jury, before finding for plaintiff, you must find from the evidence that one or more of the acts or omissions, which are in the petition of the plaintiff alleged as negligence, occurred; that such act or omission was a negligent act or omission that it resulted in the death of the plaintiff's [fol. 101] husband, and that he could not have, by the exercise of ordinary care for his own safety, avoided the consequences to himself of such negligence. Irrespective of what the negligence of the defendant company may have been, if the deceased, by the exercise of ordinary care for his own safety, could have avoided the consequences to himself of such negligence there can be no recovery. Nor, as already stated, could there be any recovery in the event his death was occasioned by his own negligence."

The court having failed to charge the principles of Code Section 2781, that, "No person shall recover damages for injury to himself, where the same is done by his consent, or is caused by his own negligence." The statement by the court, as follows: "Nor, as already stated could there be any recovery in the event his death was occasioned by his own negligence," was not charging the jury the defenses contained in Section 2781 of the code, that code section contains three separate and distinct defenses, to wit: (1) That no person shall recover when the injury is done by his consent; (2) That no person shall recover when the injury is caused by his own negligence; (3) If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him.

Either of the first two defenses contained in this section of the code would absolutely bar any recovery, and the failure of the court to charge either or both of these principles contained in the first part of the section of the code would absolutely bar any recovery, and the failure of the court to charge either or both of these principles con-

tained in the first part of the section of the code, is such [fol. 102] error as to require the granting of a new trial.

The failure of the court to have charged both of the principles of law contained in the first part of Code Section 2781 that statement by the court as follows: "Nor, as already stated could there be any recovery in the event his death was occasioned by his own negligence," when in fact the court had not already stated these principles contained in the first part of Code Section 2781, was prejudicial and harmful to movant: The court having not charged the principles contained in the first part of Section 2781, the statement that he had so charged, confused the jury and caused the jury to fail to give proper consideration to the defense of movant that the injury was done by deceased's consent or by his own negligence. The failure to give the first part of section 2781 of the Civil Code in charge to the jury, movant insists is reversible error.

And further, if it should be held that the use of the phrase, "Nor as already stated, could there be any recovery in the event his death was occasioned by his own negligence," was in effect giving in charge the principles contained in the first part of Code Section 2781, that "No person shall recover from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence," this excerpt from the charge, giving in immediate connection the two defenses relied upon by movant, that is the defenses embodied in the first part of Code Section 2781 and that embodied in Code Section 4426, as follows: If the plaintiff (deceased) by ordinary care could have avoided the consequences to himself caused by defendant's negligence, he is not entitled to recover.

There are separate and distinct defenses, either of which, if proven, defeats a recovery. And should not be given to [fol. 103] the jury in one and the same charge, or charged in immediate connection without legal qualifications and explanation, so as to present clearly to the jury these separate defenses. The charge as given confused these separate and distinct defenses. Defendant by its amended plea clearly and definitely alleged these separate defenses as follows:

That the accident was caused by deceased's negligence solely.

That deceased was not in the exercise of ordinary care at the time of the accident. That deceased at the time of the accident was guilty of negligence, which contributed proximately to his death. This excerpt from the charge is reversible error.

17. Because the court erred in not giving in its entirety the following written request, made in writing by movant's counsel on the trial of said case, before the court began his charge to the jury, said request being as follows:

"I charge you that both the railroad company and a traveler upon the highway have the right to pass over a railroad crossing and neither has a right to interfere with a proper use of it by the other. But owing to the momentum of trains, the confinement of their movement to a track, and the necessities and public nature of railroad traffic, the railway company has the right of way, and a traveler must wait until the imminently approaching train, the coming of which he knows, or ought to know, has passed. The right of passage is in the railway company."

The court omitted from the above request the phrase "Or ought to know" immediately following the phrase "the coming of which he knows."

The instruction requested embraced both phrases, "The [fol. 104] coming of which" he knows, "or ought to know" omitting the phrase, "or ought to know" from the charge placed upon movant the burden of showing knowledge by deceased of the coming of the train which struck deceased, and was hurtful and prejudicial error against movant in that one of its material contentions upon the evidence before the jury was that at the time when plaintiff's husband attempted to drive his motor truck across defendant's railway track on the crossing in question, he knew or in the exercise of ordinary care should have known that defendant's freight train which collided with said motor truck and killed plaintiff's said husband, was imminently approaching on defendant's said railway track at a rapid speed and in such close proximity to the crossing as that there would be very great danger of a collision of said train

with said motor truck, if plaintiff's husband should then attempt to cross defendant's track ahead of the then close and rapidly approaching train, and that under such circumstances it was the duty of plaintiff's husband to recognize the priority of right in defendant's engineer, operating the locomotive of said train to run the same over said crossing ahead of said truck, and was the duty of plaintiff's husband to refrain from any attempt to drive said motor truck across said railway track ahead of said close and rapidly approaching locomotive and train, and to wait in a place of safety until said train had passed over said crossing both for his own safety and for the safety of defendant's employees on said train, the evidence showing as defendant insists that plaintiff's husband did attempt under above stated circumstances to drive said truck over defendant's track ahead of defendant's said train when he knew or ought to have known of the dangerously near approach of said train to said crossing, and thus by his own negligence caused the collision and his own death. [fol. 105] For all of which reasons movant says the error herein complained of was extremely hurtful to movant and entitles it to a new trial.

Note by the Court.—I certify that the request quoted in this ground of the motion was submitted first upon the first trial of the case and was read in full to the jury upon that trial. In transcribing the charge delivered upon the first trial the stenographer omitted from the language so given in charge the words, "or ought to know." The attention of the court was not called to the omission upon the hearing of the first motion for new trial herein nor was such omission complained of therein. Upon the trial of the case resulting in the verdict herein complained of the court informed counsel for both parties that he intended to read to the jury the charge delivered upon the former trial, in view of the language used by the Court of Appeals concerning it in their decision herein. He was then informed by counsel for defendant that some changes had been made in their requests. Examining the requests to determine such changes the court found the request herein exactly as submitted on the former trial being the original request initialled by the court; and his attention not having been

called to the error of the stenographer gave the request as he thought by reading the charge as transcribed delivered upon the first trial.

18. Because the court erred in charging the jury as follows:

"I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its em- [fol. 106] ployees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be entitled to recover."

Movant contends that said charge was error in that it requires the defendant railroad company, when it is shown by plaintiff that injury or damage has been sustained by the operation of the locomotive and train of cars, to by evidence disprove every averment of negligence which may be made in the petition of plaintiff, however fanciful such averment may be or however unsupported it may be by evidence.

Movant contends that said charge was error, also because it puts upon defendant the necessity and cost of obtaining attendance of witnesses, or other evidence, to sustain the burden of disproving mere allegations of negligence which plaintiff has introduced no evidence to support and which plaintiff may never have intended to endeavor to support by evidence; so that without any evidence for plaintiff, except of injury or damage by the operation of the locomotive and cars, defendant must suffer a finding against it of negligence as to every imputation thereof made in the petition of plaintiff unless it produces disproof of every such imputation, however lacking is proof of such imputation on the part of plaintiff.

Movant contends that the burden so placed upon it, by said charge was unjust and that said charge was violative of the fourteenth amendment of the constitution of the United States, which provides "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The protection [fol. 107] of which amendment movant expressly claims and relies upon, is that the charge as so given tended to deprive movant of its property without due process of law, by subjecting defendant to the burden of disproving every accusation of negligence made against it in the petition of plaintiff, simply upon proof having been made by plaintiff that the deceased was killed by the running of one of defendant's locomotives and trains.

The Statute of Georgia (Code of Georgia—1910, Section 2780) provides:

"A railroad company shall be liable for any damage done to person, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Movant contends that if the language of said statute can properly be construed and applied, as it was construed and applied in the above quoted charge of the court to the jury, the said statute is unconstitutional, because it is in conflict with the fourteenth amendment of the Constitution of the United States providing, "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," in that, as so construed and applied, the said statute tended to deprive movant of its property without due process of law, by subjecting it to the burden of disproving every accusation of negligence made against it in the petition of plaintiff, simply upon proof having been made by plaintiff that decedent was killed by the running of one of defendant's locomotives and trains.

[fol. 108] 19. Because the court in charging the jury in accordance with Section 5731 of the Georgia Code on the subject of preponderance of evidence and in charging in immediate connection therewith a portion of Section 5732 of said Code on the subject of rules of law to aid the jury in determining the weight to be given to the testimony of witnesses, in said case erroneously gave in charge only a portion of the rules specified in said Code Section 5732 for determining the weight to be given the testimony of witnesses, and erroneously omitted from said charge the remaining rules specified in said code section applicable for use by the jury in determining the weight to be given the testimony of witnesses, movant insisting that said omission from said charge was hurtful and reversible error against it, as will now be shown to the court, and in order to do so movant now quotes the entire instruction given to the court to the jury on the subject of preponderance of evidence and of rules for determining the weight to be given the testimony of witnesses as aids to the jury in determining where the preponderance of evidence lies, said entire instruction being as follows, to wit:

"What is meant by the preponderance of the evidence is that superior weight of the evidence upon the issue involved, which while not sufficient to wholly free the mind from a reasonable doubt is yet sufficient to incline the mind of a reasonable and impartial person to one side of the issue rather than to the other.

"In determining what weight you will attach to the testimony of any witness, you may look to his or her appearance on the stand, take into consideration their manner of testifying, their interest or want of interest in the case, their feeling, prejudice or bias, if anything of the sort has been [fol. 109] made to appear, together with their opportunity of knowing the facts about which they testify, and their inducement, if any, to swear falsely.

"One witness has testified by deposition. You will consider her evidence in accordance with the same rules just given you in charge except that she, not having been before you, you could not, of course, consider her manner on the stand.

"You may also consider the number of witnesses who have testified for each side, or as to the truth of the contentions of each side, while the preponderance of the evidence is not necessarily affected by the number of witnesses. In other words, the preponderance is not necessarily with the greater number of witnesses."

Movant insists that the giving of the second paragraph of said quoted charge*d* in immediate connection with the first paragraph thereof was calculated to cause the jury to understand and did cause them to understand that the rules for weighing the testimony of witnesses as specified in said second paragraph were to be applied by them in determining where the preponderance of evidence lay in said case, notwithstanding the court in giving said second paragraph omitted therefrom the words "in determining where the preponderance of evidence lies, you may consider all the facts and circumstances of the case," which words constituted the introductory portion of Code Section 5732 from which section the second paragraph of above quoted charge of the court was taken.

It appears from the second paragraph of said quoted charge of the court that the court in enumerating the matters which the jury should consider in weighing the testimony of the witnesses, omitted to mention or in any way refer to the clauses in said code section authorizing the jury [fol. 110] to consider "the nature of the facts to which the witnesses testify, "and the probability or improbability of their testimony," which two clauses of said code section movant insists were each and both material and essential matters for the consideration of the jury in determining the weight to be given to the testimony of the witnesses on the trial of said case, and of thereby determining where the preponderance of evidence lay in said case, and movant insists that the court having undertaken to instruct the jury on the rules of law for determining where the preponderance of the evidence lay and in connection therewith the rules for determining the weight to be given to the testimony of the witnesses as a means for determining such preponderance of evidence, was bound to make said instructions complete, accurate and pertinent in itself without any request therefor by either of the parties to the case.

Movant says *to* the court erred in failing and omitting to include in the second paragraph of its above quoted charge, to the jury, or elsewhere in its charge the aforesaid introductory clause of said code section 5732, to wit: In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case" and in omitting from said second paragraph of the above quoted instruction to the jury the following other clauses of said code section, to wit: "The nature of the facts to which they testified, and the probability or improbability of their testimony." Movant insists that the omission by the court of each and all of said clauses of Code Section 5732 from the said charge of the court was vitally harmful and reversible error against movant for the following reasons:

a. Because on the issue in said case as to whether plaintiff's husband exercised ordinary care in approaching the [fol. 111] crossing in question, to discover defendant's then approaching train in time to avoid the collision which caused his death, some of plaintiff's witnesses testified in substance that in their opinion deceased could not have seen defendant's then approaching train, until his truck reached a point within a few feet of the track on which the collision occurred, giving as the reason for such opinion, that on account of defendant's track being on a fill from 10 to 15 feet higher than the highway on which he was traveling where it ran parallel with the railway track his view of the track north of the crossing would have been obstructed until his truck reached the top of the fill within a few feet of defendant's track, said witnesses, however, testifying on cross-examination that they had never made any observations from said highway when a train was approaching said crossing from the north to see how far on said highway from defendant's track at said crossing a person on said highway could see a train approaching said crossing from the north.

In opposition to said testimony of plaintiff's said witnesses I. P. Moore introduced as a witness by plaintiff, and A. J. Patterson, former section foreman of defendant, J. C. Wilson, a photographer, and H. C. Hill, a photographer, all three introduced as witnesses by plaintiff, each and all

testified that he had made observations from different points on said highway south of said crossing when a train was approaching said crossing from the north to ascertain whether said train was visible to the witnesses from his point of observation on the highway, and how far such train was from said crossing when it became visible to him. The witnesses J. C. Wilson and H. C. Hill, each testified that he had his camera with him and took photographic views of such approaching train showing the approaching train in [fol. 112] the photographic views thereof, and each testifying to the location of the camera when each such photographic view was obtained and each further testifying to the accuracy and correctness of each of said photographic views, which defendant introduced in evidence and the same now appear in the brief of evidence as part of the documentary evidence. The testimony of said four witnesses was in substance that a train approaching said crossing from the north would be clearly visible to a traveller on said highway at various points thereon, to wit: from a point 200 feet south of the crossing, and from a point 150 or 160 feet south of said crossing, and at a point a little over 100 feet from said crossing, and at a point 65 feet south from said crossing, and at a point 45 feet south from said crossing, and thence all the way to said crossing which testimony movant insists was corroborated and vertified by the actual observations by said witnesses of trains actually on defendant's track north of said crossing at the time at distances from the crossing of about 1,400 feet in one instance of 700 or 800 feet in another of about 600 feet, in another of a little over 200 feet in another. Movant insists that in view of the demonstration nature of the testimony of said witnesses as based on actual observation of the visibility of passing trains on defendant's track north of said crossing, and in view of the physical facts disclosed by said photographic views showing the contour and topography of said crossing and of defendant's railway track north and south of said crossing, and of the highway and adjacent lands south and west of said crossing and railway track, said testimony supported by said photographic views was inherently more probably correct under the facts and circumstances aforesaid, than the testimony of plaintiff's witnesses testifying that in their opinion the deceased could

[fol. 113] not have seen the approaching train until his truck was within a few feet of defendant's track. For the foregoing reasons movant insists that it was hurtful and material error against defendant for the court to omit from the second paragraph of his above quoted charge, those portions of section 5732 of the Code of Georgia, as hereinbefore specified, *and hereinbefore specified*, and therefore, that a new trial be granted on this ground.

Whereupon, movant prays the court to allow its above and foregoing amendment to the motion for new trial in said case and order the same filed as part of the record of said case, and that movants aforesaid grounds for new trial incorporated in the above amendment be inquired of by the court, and that a new trial be granted it upon the grounds of the original motion for new trial and upon each and all of the grounds of this amendment.

This December 11th, 1926.

Tye, Peeples & Tye, Maddox, Maddox & Mitchell, Neel & Neel, Attorneys for Movant.

The recitals of fact contained in the foregoing motion for new trial in said case, and the foregoing amendment thereto are hereby approved as true and correct, and it is ordered that said amendment be allowed and ordered filed in said court as part of the record in said case.

In open court, Oct. Term, 1926, this December 11th.

M. C. Tarver, J. S. C. C. C.

[File endorsement omitted.]

[fol. 114] In Superior Court of Whitfield County

[Title omitted]

Brief of Evidence—Filed Dec. 11, 1926

The following is the brief of evidence introduced upon the trial in the above-stated case, at the October Term, 1926, of Whitfield Superior Court:

The plaintiff read in evidence the deposition of Mrs. Lillie Ward Herrington, a witness for the plaintiff, sued out

on behalf of said plaintiff. The following is a brief of said deposition reduced to narrative form:

Direct examination:

I live at Tunnel Hill, Georgia. I am called Mrs. Lillie Ward and Mrs. Lillie Ward Herrington, both, and am known by both names. I lived at Tunnel Hill, Georgia, during this year. I lived there seven years. That is in Whitfield County. I couldn't tell exactly how far I live from what is known as the third railroad crossing from Tunnel Hill going towards Chattanooga. It is just a short distance, just a few steps. There is a crossing near the depot south of where I live known as the McCauley crossing. Where I live is what they call the third crossing from the depot going towards Chattanooga. I don't know how many yards I live from where this crossing is, but it is just a short distance, a few steps. It is about as far across the street to the house over there, about as far as from here to that house just across the street from Mr. McFarland's office. It is in plain view of the crossing. I lived there about the 4th day of August this year. I remember the [fol. 115] time that the truck was crossing there with the man driving. I did not know him. I learned who he was a very few minutes after the accident. A gentleman from Dalton told me. He lived only a few minutes after nine o'clock. The gentleman was killed in the truck, well I will say he was hurt because he wasn't dead when I first saw him. I was in the kitchen. My daughter ran in and said a man was killed out there and I went on out there to where he was. The truck was knocked from the crossing some feet down the track. I was down the switch a piece towards Tunnel Hill. I cannot tell you how far it was from the crossing. It was a right smart little piece, nearly even with my well. Part of the truck was on the switch. The truck was knocked, part of it on the main line south of the crossing. It was nearly against the cab. It was knocked around so that you could not go between the cab and the car. You could not go between the cab and the car. The man was knocked further south and far as from here to the door. He was lying between the main line and the side on his right side. That would be on the right side going south. I went up to him. I could not tell when I first went up that he was

breathing, but he commenced to breathe and the blood would gush out of his mouth and nose. I stayed there until they put him in the caboose to bring him to Dalton. The conductor, Ben Smith, the brakeman, Dr. Brewer and Uncle Green, a negro that lives there in Tunnel Hill, put him in the caboose. I don't know how long that was after the accident. They had to go after the Doctor. They cut the engine loose and went and brought Dr. Brewer up there, and the conductor, brakesman and Doctor put him on the cab of that train. He was not dead when I last saw him. The blood was still gushing from his mouth and nose. He never [fol. 116] moved. There was one bruise on the back of his head and one on the back of his neck. The one on his head looked like a hole in the back of his head. The back of his neck was bleeding, but his collar hid part of it. I could not tell much about that. I noticed blood on the track but did not notice any hair. There was some rags that was bloody. They put some kind of thread and waste under his head. His head was buried under the rock and the conductor took this waste and stuff and put under his head because the rock was so hard on his head I suppose. They left that stuff lying there after they moved. That was the place where he was where that stuff was. I don't know what became of him after he left there. Mrs. Qualles came up out there and quite a crowd from Tunnel Hill. The train was going south from Chattanooga towards Tunnel Hill. I did not see the train coming when I got out there the train was stopped. The cab was even with Mr. Henderson. The engine was even with the culvert. I did not see the train at all until I got out there. I did not hear it. I did not pay any attention to it. I never even heard it when it hit the truck. I did not hear the train blow or ring any bell. I have lived there so much I don't pay any attention to the trains. I did not hear any noise from bell or whistle. I could not tell anything about how fast the train was going for I did not see it. Before Mr. Henderson was killed I crossed there quite a lot. As to the condition of that crossing those rocks had sunk down below the iron bars and they were loose in there and they left the rails of the main line exposed. In crossing there in the truck or automobile you would have to mount the iron rails. There was not anything but the rock and the rock was on the ties. They

were little sharp rock. There wasn't any screening there at all. This was Monday morning, August 4th that the ac-
[fol. 117] cident occurred. On Sunday before, two Fords stopped there. They were going towards Dalton. They stalled right in the middle of the main line, they killed the engine. That was on Sunday before he was killed on Monday. The first Ford was stalled in the afternoon. The Dixie Flyer that follows the twelve o'clock train up came very nearly hitting it. It was right there in the culvert when it blowed and they got out and pushed the Ford off the track. Four men were in the Ford. I don't know who they were. They had to get out and push the Ford off the track which they did just before the Dixie Flyer came along. The other car which stalled on the track came by along in the evening. There was a lady, a gentleman and two children in it. It stopped there several minutes. That is a public crossing. I did not notice any cars stopping there before that. That track had been that way quite a while. It was all sunk down. The rock were put in on a rainy day and they never have come back and fixed it. That was about a month before Mr. Henderson was killed. After this trouble they filled up that crossing just as soon as they could get word to the section hands who were working around the bend up there and just as soon as Mr. Patterson could walk up there and tell them and they could get down there. That was Mr. John Patterson. His son works with the section hands. Mr. Patterson was there and went after the hands. I can't tell how long it was before they came. I cannot say whether it was much as an hour. They were right around the bend and as quick as they could get there. It was before dinner. They throwed some more rock in and packed it with picks and shovels. They did not put any screenings in then. It was some time after that they did that.

Q. In approaching that crossing from the south or going
[fol. 118] from Dalton to Chattanooga going along the railroad does the road run from where it leaves the fork, for instance, going from Dalton before you go into Tunnel Hill there is a road that turns to the right and crosses just north of the depot, does the road fork then coming towards your house to this other crossing down there about where that old brick building stands?

Ans. It forks there and one runs through town and one comes by my house. That one that comes by my house runs parallel with the railroad. I don't know how much higher that road is than the railroad. The railroad is high and the dirt road is down low. In going toward that crossing at my house the road is much higher than the dirt road. Going up to the crossing at my house it turns suddenly north. The dirt road there is higher than the railroad. There is a pretty steep hill there just before you get to this crossing. This truck was going toward Chattanooga.

Cross-examination by Col. Maddox, atty. for defendant:

I was in the kitchen when this accident occurred. I was going on with my work. I never heard the train. I didn't know it was coming. Trains passed there frequently and I never noticed them. I never heard the train blow. That is all I will say. My daughter was sitting on the front porch. She was alone, well there was a little boy with her about four years old. I say as you come from Dalton to Tunnel Hill, just before you get to Tunnel Hill, the dirt road forks, one road goes down through town and the other turns north and goes up in front of my house. The crossing down at Tunnel Hill is a level smooth crossing. It is a good crossing. You don't have to climb a hill up to the crossing. When you come up on the railroad at the crossing at my [fol. 119] house you are facing straight across the track. I don't know whether a truck or automobile crossing from Dalton when it gets on the track and after it goes across the front end is right straight east. It will be right straight across the track. This was a short train. It had five cars and a caboose. I did not see the engine hit the truck. I don't know how fast the train was running when it hit the truck. From what I saw there the truck was turned partly between the side track, the front end of the truck was so near the caboose you could not walk between it. I do not know whether the truck was pushed around or not but there were splinters from the truck all over my corn patch. I don't know whether the wheels tore up the rock in the crossing when it was pushed around or not. Of course the truck knocked some of the rocks out. I don't know whether the wheels made that hole that the section

men filled up. As to whether there was no necessity of filling it up before I don't know. They put the rock in and did not pack them and they were all loose and had sunk down. The rock were put in shortly after the accident occurred. I did not say that the Ford stalled there about four o'clock on Sunday before, I said Dixie Flyer almost hit it. I do not know whether it was for want of gas or what. I just know the engine went dead and they had to push it off. It had a crank but it would not work. They could not get it to start, I don't know whether there was some defect in the engine or misappliance of the brakes or what caused it to stop. I don't know. The other one stalled some time that evening. It was going towards Dalton. It just stopped like the other one went dead on the track. I don't know what caused it. I can't tell you what size those rocks were. They are small rock, some about the size of an egg, some larger, some smaller, some sharp on the edge. [fol. 120] They were different sizes and shapes. Those on the crossing were put there in a few minutes after Mr. Henderson was killed. There was nothing there but rock and ties. It seems to me like that dirt and rock is between the rails and the ties on the other side. It seems to me like there is dirt on the switch. The rocks are between the rails on the main line and cover one side of the ties and the space between the main line and the switch it seems to me was dirt.

Redirect by Col. Mann:

There was splinters from the truck in my corn patch which is right at the railroad off the crossing. I did not say the truck was pushed to one side on the crossing. It was down below the crossing. The Ford which stalled on the track on Sunday got off of the track and went on towards Dalton. It is down hill on the other side.

Recross by Col. Maddox, for defendant:

I don't know who those people were in those Fords. The caboose stopped right even with Mr. Henderson, it was past my house, right down a little piece below those big windows. The truck was not quite as far down the track as Mr. Henderson. Mr. Smith could not walk between the truck and

caboose. I don't know how far the end of the truck was from the end of the caboose. It was at an angle. I can't tell how far the end of the truck was from the end of the caboose, and end of the caboose had not pased plum past it.

SAM R. CONNALLY, sworn for the plaintiff, testified:

Direct examination:

I remember when Mr. Henderson was killed. It was [fol. 121] August fourth, nineteen hundred and twenty four. At the time, I lived in Dalton. I was manager of the Coca Cola Bottling Works. Mr. Henderson lived in Dalton. At that time he was taking a truck to Chattanooga. His employment with the Coca Cola Bottling Works, I guess you would call him assistant manager, he was right hand man there. He was there when I went there in November, nineteen hundred and twenty-two, and I think he had been there for four or five years before that. At the time of his death he was getting around a hundred and thirty dollars a month. He made a good man, very good. He had not missed a day the time I was there, two years practically. I don't know of my own knowledge how old he was. I thought he was about thirty-eight. When did I first learn of his death? I think it was about ten thirty that morning, I first heard of it, between ten and ten thirty, I think it was, maybe a little bit earlier. I am not sure. As soon as I learned of his death, I went up to Dr. Rollins office. After that, I think I went back to the plant. I did not get to see him. I went to where he was killed. I examined the ground. Some slag had been put on the crossing when I got there, it was about dusk, I think, when I went up there, some loose rock had been put on it. I wasn't there before he was killed. I examined the place where the blood was on the track. I saw some waste there with blood on it. That was about ninety feet, I think, south of the railroad crossing. The truck was a little nearer to the crossing. It was knocked towards Tunnel Hill, at least that where the blood was and the truck was on that side of the crossing—on that side. He was driving a Federal truck, ton and a half, ton and a half to two tons. It was practically empty, had some springs in there taking back to

Chattanooga. It had what you call a stake body; of course, just a flat bed, cab and wind shield. When the truck is run [fol. 122] ning empty, it makes a noise, solid tire truck, they are pretty noisy, rough road along there, too, make quite a bit of noise. I am acquainted with the dirt road along there and the railroad, as to how they run, paralleling. The railroad is the highest, you have to go up across the railroad. Before you get to the crossing, you go down grade and then up grade and make a sharp turn and go right to the right. At some points the dirt road is fifteen feet below the railroad track. Of course, it gets higher as you go up to the track, crossing; it is a steep pull, nevertheless. In going along that low part, I don't think you could see a train coming south. I said I think not,—could not see a train coming. I haven't across it on that truck, Judge. Going up to the track, it is a steep grade. When you go up to the track, before you get there, you are going parallel with the track, and then when you go to go across the track you make a sharp turn to the right, you are right at the track. Mr. Henderson was going in that direction when he left here to go to Chattanooga.

Cross-examination:

Some of Mr. Henderson's duties were to deliver the bottle Coca Cola over the country and around town. He drove the truck and sold this Coca Cola and delivered it to the stores, and he had been at that for two years while I was there and several years before that. He had delivered Coca Cola up as far as Horn's store, that is beyond Tunnel Hill. There is a fork road, you know, before you get to the crossing, there are two crossings you can cross. I couldn't say that most of the traffic going up the Dixie Highway, unless they were going to stop in Tunnel Hill, went up to this crossing where he was struck. I don't know whether [fol. 123] a person would naturally go over this crossing where he was struck going to Horn's store, or not. That is one way to go. He had been delivering Coca Cola to Horn's store as long as I had been there and I don't know how long before. In the summer he made the trip once a week, when the weather was cooler, every two weeks. In the summer time he would go on Friday; and every week in summer, and in cooler weather not so often. He worked Tunnel Hill. He

didn't go into Catoosa county by that road, I don't think. I think Horn's store was the last stop. At that time, this truck was five years old, I think—we had had it two, I had been there two years—I think it was about five years old. It had been delivering Coca Cola about that length of time. At this time it was in need of some repairs, he was carrying it to Chattanooga for repairs, and also some springs off another truck, it needed some rear tires, on the rear wheels, the front were all right. I know they were. The truck did not have a starter. If the engine went dead, you had to get out and crank it. This truck had four speeds—three forward and one back. If a person wanted to go real fast—you could not go very fast. With considerable pulling power, you would get in low gear, the lower the speed the more power, that's the way it worked, just like any other car. This dirt road as it approaches the crossing coming from Tunnel Hill towards the crossing, it runs parallel, that is, right along side the railroad for some two or three or four hundred yards before it gets to the crossing, I imagine it is that far, and some fifty or a hundred feet before it gets to the crossing, it turns to go up on the crossing. If a person going along that road towards Chattanooga for some two or three hundred yards, he would be facing the train if the train was going southward, because you are parallel to the track. I said I didn't believe a person when he was [fol. 124] down in the lower parts of that road could see a train as it approached from the north. I have never been there to look and see if that was true when a train was approaching. Thats just my opinion without having looked to see whether it was right or not. Looking at this picture Number Six—with the camera setting further away from Tunnel Hill than the crossing and looking back towards the crossing, I have my bearings on it. That seems to correctly represent the roadway there. This is the road going on north, up the road, the railroad, Henderson traveled this road this way, and then turned to the right here to go up to the railroad crossing. This is the incline slope I am speaking of going up to the crossing. That picture, though, does not give any idea as to the grade there. I am well enough acquainted with photography to know that picture does not show the grade. I know it does not show it. This picture marked Number Seven, where I see the camera setting back

from the crossing some sixty-five feet, supposed to be. Henderson would have come from back here and turned over the crossing that way—that train is going north. He would have gone that way, that is part of the incline he would have had to climb. Now if that train on there—if this picture was taken from sixty-five feet back there from the crossing, I said I dont' think a man would see the train when he come up to the crossing, and I still think so—thats right on the grade there. Get back down in that swag, thats when you are down here to this culvert—I am not speaking about that far—right along there; I still don't believe a man could see a thing. Number Seven picture, with the camera sixty-five feet from the crossing, thats down grade considerably. You asked as if I thought I could see it, and I don't. I have not seen a train pass there. I stand on the proposition I still [fol. 125] don't think so. This man's actual salary was one hundred dollars a month and his commission right around thirty dollars. He got some commissions, not particularly on what he sold but on increase of the sales of the plant. His actual salary was one hundred dollars when I went there and I put him on a commission basis, in addition. His actual salary still remained at one hundred dollars, and I gave him some commission in addition, right around thirty dollars. I cannot tell you exactly unless I go to my books, increase on the entire sales, entire plant, for a certain year. The business did not go back down—if it did, yes, he did not, but it didn't go back down. I took the year of 1922 as my standard.

R. A. Wardlaw, sworn for the plaintiff, testified:

Direct examination:

I am a brother of Mrs. Henderson. I remember the occasion of Mr. Henderson being killed. I went up to the place where he was killed. The blood was east of the crossing. The train coming from Chattanooga would be coming down that way. There was some blood in the rock and the ballast, between the tracks, and I believe there was some on the end of the ties. I noticed a little bit of waste there. That was, I think I stepped twenty-five steps south of the crossing; would be about seventy-five feet. I think

the front end of the truck was about sixty-seven feet, I think we counted it, he was knocked eight feet further than the truck—the blood I speak of was about eight feet south of, or as I call it, east of there. I noticed, in approaching this crossing, from this side, the character of the ground. Well, you start up on that track, going what we call west—you don't start of the track; if you are going west, you come [fol. 126] out of that hollow and then you turn due north, on across the railroad, and the ground is low until you turn north, well it just gradually climbs when you turn north, and then it is a pretty steep grade from there on up to the side-track. I would not know how to tell you what per cent grade, but it is about as steep a grade as you find on any public road, in approaching that railroad crossing, that is, if you turn to go straight across the track. In going along west from towards Tunnel Hill, you first go down the grade about two hundred feet this side to a little wooden bridge. I drove up there today, it looks like that dirt road is about fifteen feet below the railroad, that would be my guess. After you leave that culvert down there, or wooden bridge, the character of the ground going up is a very gradual slope until you turn straight across the track, then it is very steep. I have never been there when there was a train coming either way, but you cannot see the track until you get right almost on the side track, passing track, whatever you call it. There are two tracks there. The main line, I believe, is on the far side, running right there with the other track. If you are down here, before you start up that grade, I wouldn't think you could see anything approaching there, I mean from the bridge. In going up that grade, you would have to be almost on top, is the way it looks to me, before you could see anything approaching. I cannot give you any idea about the steepness of that grade. I am not an engineer.

Cross-examination:

As to what a man could actually see with a train coming there, I have never been there with a train coming.

[fol. 127] T. J. Bryant, sworn for the plaintiff, testified:

Direct examination:

I know where the crossing is, known as the third crossing, above Tunnel Hill, public road crossing where Mr. Henderson was killed, north of Tunnel Hill. I went up to that crossing for the purpose of making an examination of approach to the crossing and whether you could see a train. I could not give the date that I made the examination, it was just a few days before they had the trial. I rode in a car in approaching that crossing, went along this side of the approach. The dirt road run parallel with the railroad there for some distance, possibly a quarter of a mile, just before we reached the crossing there is a deep ravine or hollow that goes down considerably below the level and below the railroad, and then when you come to the approach, it goes up with a kind of a curve, this way—goes up that way, and it is steep rise there, I suppose I don't know how far, fifteen or twenty steps from the time you start up to the top of that rise, and down in this hollow, fifty or seventy-five yards before you get to the approach, when you are down there and start up on this approach, you could not really see above the crossing at all. If you are down under here and the railroad is up here, and when you turn at this approach, we were, I would say, twelve or fifteen feet before you could have seen a car any distance, a hundred and hundred and fifty feet coming on the track; just coming up here and when you started up you could not see any track up there at all from the bank; it was down under it; about the best recollection I have of the location. In going down, before you get to the hollow, you go down grade; that hollow, you start out of there up on the approach, it runs on a kind of curve. In making that curve, when you get about [fol. 128] the top of the road bed there, it is going due north, as well as I recollect the direction. The road runs kind of, seems to me like, west or northwest, and you turn

north when you get up there, you make a square turn there. I was in a car. The wind shield and the top of the car, the top, back under here, this was up here so high you could not see. You come around this way, the top obstructed the view of the track in approaching it.

Cross-examination:

I think it was something like over a year ago that I went up there. I don't know that Mr. Mann carried me up there so I could be a witness in this case, he never said anything about being a witness. I don't know that I knew I was going to make a witness, I supposed they might want me to investigate it that way. I was not paid for the trip up there or to be paid. I don't know that Mr. Mann and me were close friends and I went along to help him. I was not staying in Mr. Mann's office at that time, I have had, not at that time. He never said anything about it until that evening he came by my office. There was a gentleman and lady in the car. I don't know, strangers to me. He introduced them to me, but I have forgotten their names. That was all. I don't know the make of the car. It was a two seated car, as well as I recollect, it was a sedan, or something like that. It was not a truck. Went up there in the evening. I didn't wait until the train come along to see what I could see. When I got down in the hollow, where the culvert was, what I mean is if there had been a train coming, we could not have seen it. There was no train there. Well, I know by reason, I could not; down here you would have been looking over that elevation, too high for a train. I don't know that I ever saw an engine about fifteen feet high. I [fol. 129] don't know how high I ever saw one. To the top of the smoke stack might be twelve or fifteen feet. That's the way I estimated it, that an engine would not show up down there while I was down there. As to the windshield hindering your view, that was when he started along here, starting up on the approach, you had to get away up here to see. I was riding on the back seat. That's what I am going by, it interfered with my vision. He didn't say he really wanted me to see. I was just looking at the crossing and the grade there, was all I was looking at. After you get to that little culvert in the bottom of the hill, I don't think that is some hundred yards, or more, from the cross-

ing. It runs partly level a little and then it gradually inclines until you get to the top of the crossing, and when the car starts up an incline the front end is lifted up the same as on a level ground, in proportion, because it is elevated. The top would not interfere a bit more, going up, than it would on level ground, because it would be elevated. Looking at this picture Number Six, where the camera is setting in that road running north of the track this is Tunnel Hill back here, looking back towards Tunnel Hill that is the road Mr. Henderson traveled; going up this way and the crossing is right over here; here's the little bridge right down in here, back *back* in there, that is Tunnel Hill—the railroad is right up here going towards Chattanooga, this way, here it is right here, then here it is where it drops into the hollow and right here it turns up, there is the fork of the road right there. I think that is pretty much like it. These houses back here represent Tunnel Hill. He was going this way, right on up; one branch of the road goes up the railroad, and he turned up this incline right here, that is the incline I am talking about. This seemed to be flat here and [fol. 130] then the incline turned up, that's the way I recollect it. Looking at picture Number Seven; here's the road that went straight on, Tunnel Hill back here, there's the incline I am speaking of going up—up that way is north, the train was going north. If the camera was back sixty-five feet in the roadway, a man could see a train if it was up on top of the main line, that is, right on the crossing. These pullman cars are some eighty feet long. Looking back towards Tunnel Hill, coming that way, might make a difference; but coming from towards Tunnel Hill, I don't think it possible. Counting the coaches up there—one, two, three, four, five, six, seven coaches and the engine. I think it would make a difference whether the train was traveling north or south, or some extent, because you could look back this way, you could see, that elevation there. I catch the point that we are looking in this picture the same way Henderson would be looking going up that way, the road, that is, looking up towards Chattanooga, I understand that. I don't think I am just wrong in my estimate, in my opinion. I am going to stick to it in the face of that. Here's the train, here's the road he was traveling, here's the road that went straight up the track, here's the train from Chatta-

nooga—I can't say where that camera would be, if that was above the crossing. Here's above the crossing, all up there—well, that picture is not the way I pictured it in my mind. I don't say a man coming up that road could not see a train coming; I merely say, having been there when no train was coming, that's my opinion. I don't say it is impossible in my imagination, I don't think I could have seen it.

Redirect examination:

I would not have knowed that was the picture of the place [fol. 131] the way I estimated it; really, if I had picked up the picture, I would not have knowed what it represented.

W. T. Kenner, sworn for the plaintiff, testified:

Direct examination:

I live here in town. The day that Mr. Henderson was killed up there in Tunnel Hill I was going to Ringgold court. To Stevens, Mr. Hollingsworth, Charlie Hollingsworth and H. L. Ezzard. We traveled along by this crossing. We crossed there somewhere between thirty and forty minutes before Henderson was killed, I don't know exactly. The condition of that crossing that morning, the rails were up higher than the road and there was some loose rock in the roadway—loose rock in the roadway. That had a checking effect to the motion of the car when you would strike this rail and rock. It had no screenings on it, did not. I don't know whether those loose rock there were just put down loose between the rail, or not. They were loose there, the cars had knocked them about at various places along the track and between the track. It had the effect on my car of very near stalling me. I am familiar with the approach of that crossing up there going from Dalton to Chattanooga. You approach it about ten to twelve feet below the railroad. The dirt road is lower than the railroad, and then when you strike the approach to the crossing, it is about a twenty-five per cent. grade, I suppose, right on up; is a very steep grade and very quick turn. When you get up you turn north in crossing there. I did not examine to see if I could see a train until I got on top. I have been

there at various times, I use that crossing altogether, sometimes three or four times a week. You have to get up within ten feet of the railroad before you can see clear down the east or west.

[fol. 132] Cross-examination:

I don't know whether these rock in the crossing that I speak of were ballast rock, or not. I didn't notice them that close, they were just rock on the crossing. They were not tamped in at all; they appeared to be ballast rock, what you call them. They were in the crossing and in passing over the cars seemed to have churned them out. I was in a Ford. Mr. Ezzard was driving. I warned Mr. Ezzard about the crossing before we approached it, and he changed his gears after he got up nearly on the crossing, and went into low gear and went on across. I have never been there and stopped and sat in a car in the road back from the crossing to see how far you could see a train. When I said I didn't think a man could see a train until he got in ten or twelve feet of the crossing,—I look for trains every time I cross there. I have never gotten in the road and watched to see a train coming, for that purpose. I never have.

T. W. Stevens, sworn for the plaintiff, testified:

Direct examination:

I was in the car on the fourth of August, nineteen hundred and twenty-four at the time Mr. Henderson was killed up about Tunnel Hill here. I was going to Ringgold. I passed over the crossing there north of Tunnel Hill, first crossing. How come me to notice the crossing, the crossing was very rough and we like to have stalled on the track. The rails were a good deal above the crossing; seemed like the ballast, filling in around the timber, had not been placed back, just partly so, it was a very rough crossing. That left a rough place between the rails. I am familiar with the crossings, I think. It was rough. I say my car came near stalling. We went on up to Ringgold and we heard the news in about [fol. 133] twenty or thirty minutes before we got to the

court house. It is a very steep grade, approaching that crossing, getting up on to the railroad; as you turn off the road you have to go comparatively straight out. I think there is a culvert and dirt road before you approach the hill going up. I could not give a definite answer as to about how much lower the dirt road is than the railroad track, it is several feet, tho. You would have to be up just in a few feet of the rail to see a distance up or down the track. You are going in this direction before you start up that way, and then you make a turn to go up there; in other words, you are going from towards Tunnel Hill; you are going right along, you might say, the direction of the railroad runs, and then you make a turn at the crossing. I seen the truck after it was knocked off, didn't see it before. I dont' remember how that was constructed as to the top of the truck. I just seen it knocked off, paid very little attention to it.

Cross-examination:

I don't live in the lower end of this county and this crossing in the upper end. I live on the west side about three and a half miles from Tunnel Hill. This day I went over the crossing, I was not driving the car. It was a Ford, that's my recollection. I couldn't say what year the car was in, say, down at the bridge, couldn't say what gear it was in going up the hill. I don't know what gear it was in going across the crossing, we were going at a reasonable rate, I didn't pay any attention. We never stopped, came near stopping but we didn't stop. This rough place halted us some but we went ahead. I think this rock was the ordinary ballast rock you find in a railroad. I was riding on the back seat, is my recollection. I couldn't say for [fol. 134] sure that I have ever been there and gotten down in the road when a train was approaching from the north to see what I could see, I had been along there when trains had been there, in fact, never paid much attention to that crossing. I was along there shortly after that—a man would have to be eight or ten feet of the track. There wasn't a train there then. I have never been there when a train was coming to see if a man down below the crossing, say a hundred feet, could see the train coming from the north. When I said awhile ago that a man back some dis-

tance from the crossing could not see up and down the track clearly, I meant he could not see up and down the track—the train would have to be near the crossing to see, that's my opinion. This picture, Number Six, taken looking towards Tunnel Hill, these houses in Tunnel Hill; here's the way I traveled and here's the way Henderson traveled.

Here's the road that goes straight on, and here's the road that turns up the crossing, the railroad would be here, that's the railroad, you see it right along there. That's not the little bridge I am talking about down in the hollow, the bridge is nearer the crossing. I think it would be right along here in the picture. I say I don't think that is the little bridge Iam talking about there. There must be a bridge is nearer the crossing. I think it is nearer the crossing. I think it would be right along here in the picture. I say I don't think that is the little bridge I am talking about there. There must be a bridge right along in here—possibly one down there, too. If a man was standing down one hundred feet from the crossing, in the dirt road, and the train was six or seven hundred feet north of the crossing, I do not think that a man, standing in the road, could see it. Looking at this one, with the train on the track, how high it stands up, here's the road that went straight on, this is taken with a camera looking north and Tunnel Hill is back this way, the dirt road goes on here, this is the crossing we crossed here—you mean to say a hundred feet back this way towards Tun- [fol. 135] nel Hill? Of course, with that train there and a man back here, could not see it. Then, as he come up to that crossing, hundred feet before he got to it, he would not see the train if it was north of the crossing. With the cars extending some six or seven hundred feet up there, he could see this part of it but not that part. He could not see very far back this way. I cannot explain how the camera shows it if a man could not see it, I am not on to that.

I. P. Moore, sworn for the plaintiff, testified:

Direct examination:

I live at Tunnel Hill. I have lived there thirty years. I had occasion to cross this railroad crossing on Sunday be-

fore J. O. Henderson was killed there on Monday. My wife and two children were with me, and I believe by father-in-law, was with me. I guess it was about six o'clock in the afternoon when I crossed there, five or six, somewhere along there, on Sunday. I was going south. In approaching that crossing from the north, its condition as compared with the approach from the other side going to Chattanooga—you go straight up to the crossing from the south, the road runs right straight to it; going north, you run by the side of the railroad and then turn across the crossing. That is an easier approach for the car than the other, I think. The condition of that crossing that Sunday afternoon, between the rails was just loose ballast, loose rock, between the rails of the main line. I had to stop my car, I wasn't using power enough to get across it. I was using power enough to cross an ordinary crossing in proper condition. In order to cross there, I had to throw it out of gear and use a little more gas. In approaching that crossing going towards Chattanooga from Dalton, along [fol. 136] that railroad, I drove along the side of the railroad for some distance, and you go down a hill to a little culvert, a bridge, and you cross that bridge; about sixty or seventy feet the other side of the bridge you begin to climb a hill again, back alongside the railroad; when you get up on top of that little hill, you climb an embankment up on the railroad, turn to the right. I never measured it, but I think the dirt road is about fifteen feet lower than the railroad there. That embankment, when you turn to go across the railroad, I don't know how steep that is, I would say you have to climb from the foot of the hill, you would have to climb up to the top of the railroad about fifteen feet to get up there and you would have to do it about a hundred and fifty or hundred and sixty feet, something like that. There is a road that runs along, keeps on the side continuation. Where you start up from this lower road across that, that is due north of the track, where you turn across the railroad. You turn to the north there and the road runs north and west, and when you go across the railroad and go practically due north. When you get on top, your eyes then are facing toward the north and the railroad is running say east and west. Before you turn up from that road, before you undertake to get over that embank-

ment there, on top of the hill where you turn north, I don't think you would be over about—I will have to guess at the number of feet from that road up to the level of the track, I imagine it would be about four or five feet. When you get up on top of that track, to get back, you have to go down that steep grade, if you were to back back, I mean if you would undertake to back your car off, you would have to back down like you went up, of course. From the foot of the hill up to the crossing, that is a hundred and fifty feet up there, fifteen foot climb, that would be about [fol. 137] a ten per cent. grade, wouldn't it? From this road I would say it would be five feet to the track, I imagine, from this road, on the hill, to the track, I don't know exactly, it is very steep.

Cross-examination:

I testified in this case when it was tried before. I don't remember that, at that time, I was asked to give my opinion as to how far a train could be seen by one approaching the crossing before the train got to the crossing, and that I testified that I did not think they could see it until they got right close to the crossing. At that time, I never had made any observations about it. I recall a week or so ago when you came to Tunnel Hill and got me to go up there. You let me say and maneuver as to seeing the approach of the train, placing the car, et cetera; I was along. We first stopped the car at the bridge, across the culvert. There was a train came while we were standing there. From that point, looking north and west, we figured, I think, you could see the approaching engine about six hundred feet beyond the crossing. We were a little over two hundred feet south or east from the crossing. At that point, looking west you could see an approaching train eight hundred feet; and six hundred feet north of the crossing,—that would have made eight hundred feet. I stated there was a place a little worse just west of that. You asked me to place the car at that point, I did, and while there another train approached from the north, going in the direction of Tunnel Hill. At that point, you could see an approaching train a little over two hundred feet west of the crossing. I believe, the distance from that point to the crossing was a hundred and fifty or hundred and sixty feet, somewhere along there; then from that

point you could see an approaching train three hundred and [fol. 138] fifty feet. There was no trouble to see it. The second time we stopped right up against the foot of the hill, that was about a hundred and fifty feet or hundred and sixty feet from there to the crossing. Then we went along about one hundred and twenty feet, something like that, from the crossing. Then looking west, I think you could see a train approaching the space between about seven posts, seven telegraph posts. We figured them a little over two hundred feet apart, then you could see it fourteen hundred feet, or up near where the curve come around. No difficulty in seeing it. We were just a little over one hundred feet from the crossing at that time. On the occasion I testified to, when I crossed this crossing coming from the north to the south, I did not miscalculate my guess, I miscalculated the crossing. I was using enough gas to cross an ordinary crossing, but I didn't get across, and when I put on more gas I had no trouble getting across. I approached the crossing in low gear, I believe I was driving a Ford—I believe I was driving a Ford, if I am not mistaken, I don't remember whether a Ford or Chevrolet.

Redirect examination:

I believe it was last week I said they come up there and run some trains. Colonel Maddox came, and Swift and Porter; went up to the crossing. They were passenger trains, those fast trains—had fast trains, I mean the Dixie Flyer. I will tell you what we did. We stopped at the little bridge, which was, we figured, we didn't measure it, we figured, though, about two hundred or a little over two hundred feet from there to the crossing, and from there we could see the smoke stack on that train as it come between the two signals down at the north switch, we call it, which was, we thought, [fol. 139] about six hundred feet. There is a space between four telephone posts, which would be three, I suppose, about two hundred feet; then we crossed the bridge and come right up to the foot of the hill, which, of course, puts you under the hill, couldn't see as far as * * * which was about a hundred and fifty feet or hundred and sixty feet from the crossing; then you could see the train about two hundred and twenty feet the other side of the crossing. Then we moved up a few feet, I don't remember. If that train had

been there and running forty miles, two hundred feet, it would have passed the crossing before Henderson got there. Then we pulled out something about a hundred and twenty feet, right there you could see the train some distance down the road, I believe it was about seven spaces—if you were standing watching for it, betwen seven poles, I reckon that was six spaces, no, I believe it was seven spaces, it would be fourteen hundred feet. I was sitting on the front seat of Colonel Maddox's car. We were looking for a train, I was looking through the wind shield. I was on the right hand side of the car—wait a minute—I believe they put me on the left hand one time and the right. I have forgotten which side I was on, I was on the driver's side once and the other side once, and I was watching for it, looking out. I saw that truck there, I don't remember how it was constructed or that I saw the cab before it was torn up, I have seen it lots of times but didn't pay any attention to it. I don't know that it had solid tires. I just don't know. I have seen the truck lots of times, I couldn't tell you whether it had a curtain over the top or not, I have seen it but I don't remember it. They did not put me on the engine of those cars to let me see how far they could have seen Henderson, they [fol. 140] didn't stop long enough for me to do that. They did not suggest that I get on the engine and see how far I could see that ton and a half truck.

Recross-examination:

These trains were the regular trains that run there every afternoon. I didn't know about being on time, they were the regular trains, I believe they were on time. They were the two Dixie Flyers and train known as Number One. I believe you asked me to do that, the placing and sitting where I wanted these observations made from. You had nothing to do with that except asked me to do it. I was in your car, a Buick. The seat of that, I would just have to guess, but I imagine it would be lower than that truck. Starting up that hill, as you go up, you are lifted up and the front end of the car is lifted up too, naturally, and that would enable you to see better the further up the hill you got, and in approaching all the way, you are going facing the way that train came until you turn.

Examined further by Mr. Mann:

The train passed the crossing mighty quick, but I didn't time it, just a few seconds.

Dr. L. B. Hubbs, sworn for the plaintiff, testified:

Direct examination:

My business here, I am an optometrist. I examined Mr. McCollum's eyes, the gentleman sitting over there. I first made the examination in 1923. I- January, nineteen hundred and twenty three, I found both eyes—he is near sighted in both eyes and at a distance without glasses his vision is not good, but close his vision is good, tho near sighted; with [fol. 141] glasses on his eyes are good at a distance, with his glasses on. Without his glasses, it is not as good as it is with far sighted people, it is just the opposite. That was in January nineteen hundred and twenty three. I examined them again in nineteen hundred and twenty five. My record show that they were about one-third worse then than in nineteen hundred and twenty three. I mean the eyes were getting weaker. It took one-third stronger glasses in nineteen hundred and twenty three. I have observed him since that time on the street—observed him since then. I have not examined his eyes—as to the condition now—I couldn't tell you that, I have not examined his eyes since 'twenty-five, but I see him on the street. He is getting along very well, he does not work any, I don't think now. I don't see him at work, don't work. I couldn't tell the conditions his eyes are in today, Judge. I fitted some glasses for him; I fitted a pair of lenses in nineteen hundred and twenty three and nineteen hundred and twenty five. I had to make new lenses in nineteen hundred and twenty five—that was in May, I believe is about the twenty eight day, I have the record—twenty fifth or twenty eight of May. The last time I saw him on the street he did not have on his glasses. I see him frequently. In 1923 and 1925, he always wore his glasses when I saw him. As a physician—the older he gets, as he goes on, his eyes get worse, his distant vision gets worse; his reading distance, sometimes gets better, but his distant, seeing in front of him, gets worse.

Cross-examination:

Being what is known as an optometrist, I do not treat diseases of the eyes, or have dealings with them. I merely, where a man's vision is defective, I test his eyes by seeing [fol. 142] what he can see and then fit glasses to correct his trouble. That's what an optometrist is, he measures the refractory part. My first examination of Mr. McCollums eyes, first test, was in January, nineteen hundred and twenty three. I have the record with me I made at that time here. This is the first record. I show there vision in his right eye was minus "one" and in the left eye minus "one and a quarter." That is correct. That minus "one" in the right eye means that it takes a minus "one" glass to make him see a normal vision; twenty by twenty, that is normal. I mean I get one of these cards an optometrist uses to hang up on the wall with letters on it. I have not one with me. It is just a card on the wall supposed to be twenty feet away, the one I use is twenty feet away, and a man at twenty feet ought to read the letters marked twenty, there is a certain size letter he should read at twenty. That, indicates that when he has this glass on his right eyes he can see the letters he is supposed to read at twenty feet, he can read these letters; that just calls for the kind of glass he needs; when he puts this glass on he sees, naturally and normally, for near sighted people. Then when he had the glasses on that I gave him he would see normally; he would see 20 x 20, and that gave him normal vision. At that time, in January, 1923, I gave him a pair of glasses, gave him the lenses to go in the frame at that time. I have seen these goggles that all engineers wear to keep cinders out of their eyes. I gave him lenses to fit in those goggles. That was some eighteen or nineteen months before this accident happened, I don't know whether he was wearing these goggles, or lenses. I gave him in August, nineteen hundred and twenty four, or not. The next time I saw him, made an examination, May twenty eighth, nineteen hundred and twenty five, that was something like a year after this accident, or [fol. 143] not quite a year, about nine months. I gave him a still different set of glasses this second time, a little different glass, about a third stronger. I don't know that, just about three months after I gave him these glasses, he quit the railroad entirely, and did not offer to run any more. I

don't know whether he did or not. With these last glasses, I again corrected his eye sight to where he could see with the glasses on. Those first glass, the condition I found his eyes in, there are a great many people that go on with that much eye trouble and don't even wear glasses, sure. I ought to call it more than a slight defect I found the first time, but there are lots of people go with that much, and perhaps more. I would not want to say I would find a fourth of the people with that much defect. I never figured that out, I would not want to make a guess on that. There are some children going to school with that much defect in their eyes without glasses. When you get that glass on, that brings the eyes back to where they see the normal vision.

Redirect examination:

I don't know anybody with eyes defective as his were trying to run an engine, Judge. His eyes, when I examined them about nine months after this occurrence, how much worse they were than when I examined them before the occurrence, well, this record, I think the date, one of them is 'twenty three and the other 'twenty five, is more than nine months have you reference to this date. I don't know when the accident was. The difference between these two records, the last time it was about one third weaker than it was before. In other words, his eyes were one third worse the last time I examined them than they were the first time, ac- [fol. 144] cording to my record. This vision I fitted up at the time, in 1923, and his eyes got worse, as I found them, one-third, nine months afterwards, I would say the glasses I fitted him back there would not be sufficient to give him good vision, they ought to have been refitted up to that time—at the time of the accident—in other words, I fitted his eyes in 1923, January; and about a year and six or eight months after that, I say they grew gradually worse and I then think about one-third worse, nine months after that the glasses I first fitted would not make a proper vision, they ought to have been refitted—for near-sighted people there should be an examination every twelve months. That is in order to keep up the vision, to keep the correction up. I fitted them in January, nineteen hundred and twenty three. The accident occurred August fourth, nineteen hun-

dred and twenty four; I say that the eyes then, the glasses ought to be refitted to have made the vision perfect, it should be done.

Recross-examination:

When I say perfect, I mean when he reads normally. When it comes down to seeing a big thing as a ton and a half truck, it is bound to made some difference. He would see the truck.

Examined further by Mr. Mann:

He would not see it as quick.

Mary E. Henderson, sworn in her own behalf, testified:

Direct examination:

I am the widow of J. C. Henderson, killed by the railroad August fourth, nineteen hundred and twenty four. I had been married to him fourteen years. During that time, he had had two weeks vacation—fourteen years, and he had [fol. 145] lost very little time from sickness, as far as that is concerned, he had never had any serious illness at all, not enough to keep him away from work but a day or two at a time. He had a regular job, the whole time, fourteen years. He was thirty-eight years old the seventh of February, nineteen hundred and twenty four, and he was killed the fourth of August, nineteen hundred and twenty four. He was killed in this county, at the crossing up there described, I suppose it was a public crossing. He was working for the Coca Cola Bottling Works at the time he was killed. He was getting about one hundred and thirty dollars a month, his regular salary—we got our house rent besides. He got twelve hundred dollars cash and then he got a commission. That commission was something about the sales of Coca Cola, I never did exactly understand it. He got the commission. It was different amounts, the sales were better sometimes, during the summer months, they were always better. That is true to all drinks, I think. The commission he got, one year with another, I think was about twenty five or thirty dollars a month. In addition to that, he got

house rent. We had never been able to get a house here that we could live in for less than twenty-five dollars or thirty dollars, or up to thirty-five dollars a month; a very small house would be twenty dollars a month or twenty-five dollars, all we ever looked — we got that in addition to his salary and commission, that was furnished by the Coca Cola Bottling Works. The last time I saw Mr. Henderson was before he went to Tunnell Hill, before he started to Chattanooga. I traveled in this truck that he was killed in, acquainted with it. It had what you call a cab over it, the cab was made with solid sides and it came over the front, the front was a little lower than in the back, wind shield in front. The wind shield, of course, was lower; the [fol. 146] cab was lower in the front than in the back, it curved over. It comes down in lower than in the back. That truck, in running empty over ordinary roads, made quite a good deal of noise, especially when it was empty. That was the truck in which he started to Chattanooga that morning.

Cross-examination:

I rode in this truck some with my husband. This top of the truck that I spoke of, I suppose it was an ordinary sloping top so the rain would run off. The truck had a body on it, I don't know what you would call it. It wasn't solid sides to the body. The cab had some wooden pieces that went up the side, but the front part of the cab was open. Where you got in and out on both sides it was open. I couldn't say how many times I have been across that crossing with my husband, I don't remember exactly; three or four times, my best judgment. I imagine so, maybe not so many. I have been drawing twelve dollars and a half a week from the insurance company since this happened, and I have all that to pay back—I have all that to pay back from what I recover from the railroad. When I collect from the railroad that stops, but if I don't collect from the railroad I draw that twelve fifty right on. I lived where I am now. I rent rooms for a living. I pay thirty dollars a month for the house. I rent out four rooms. I don't know how much of the thirty dollars I get back, I couldn't

say. We had only been there a little while. There are eight rooms in that house. We occupied four rooms.

Redirect examination:

That was compensation under the workman's compensation law. That's the way I have had to make my living [fol. 147] since the death of my husband.

Examined by Attorney J. A. McFarland, for intervenor:

This is a copy of the award of the Industrial Commission which was signed by me and the Coca-Cola Bottling Works; that's my signature, in which they agreed to pay me twelve dollars and seventy-five cents a week for three hundred weeks; they did not pay my burial expenses. I paid them myself. You allege that the insurance company has paid me fifteen hundred and fifty dollars, in total. They have made me payments all along very readily, they have paid me that much money, and have agreed to pay me thirty nine hundred dollars. I thought yesterday you had a mistake in the amount but that is correct. I am drawing this under this award and under insurance which the Coca-Cola Bottling Works carried on the life of my husband.

Recross-examination:

That was not the insurance my husband carried, that was the insurance the Coca-Cola Bottling Works carried.

Plaintiff introduced, without objection, Carlisle Mortality Table, page 845, Volume 70, of the Georgia Reports, showing the life expectancy of an average person thirty-eight years of age, to be twenty-eight years and ninety-six one hundredths years.

J. W. McCollum, sworn for the defendant, testified:

Direct examination:

I was the engineer on the train that struck the Coca-Cola truck above Tunnel Hill in which Mr. Henderson was

killed. I am not working for the W. & A. Railroad now. I [fol. 148] got overheated in Calhoun, July twenty-fourth, and got the cramp, and my eye, you might say, entirely out. I cannot tell a white man from a darky now. I said July tewnty-fourth, year nineteen hundred and twenty five. At that time, up until that time, with the aid of glasses, I had been able to see good. I got overheated switching at Calhoun and drank too much ice water, and the steam from the cab and the boiler heat, and sun heat, was awful hot in August, I got overheated and cramped, my hand could not turn loose of the throttle, had to take the other hand; that was on Friday, the twenty-fourth of July, nineteen hundred and twenty-five. I was at Kingston then, on Saturday morning, and I had an awful bad headache, didn't eat breakfast or any dinner, got up about Ringgold it seemed my eyes was failing me, severe headache, my head was cold, never had such a feeling, before I got to Chattanooga, I couldn't hardly see at all, and Sunday morning I couldn't see my own face hardly in the mirror. I never offered to run an engine after that, I could not have done it. After this accident up here when Mr. Henderson was killed, from August twenty-fourth to July twenty-fifth, I went on a passenger train and run two and three. I did not have any trouble seeing, I run a fast train. I heard this optometrist, Doctor —, testifying giving me some lenses in 1923. I had these on at the time of this collision, I wore them all the time in goggle fashion to keep sparks out of my eyes. It would throw your vision away off for miles. I could see as good as I could when I was a boy, couldn't tell any difference in my vision. The day of the accident I was running a local freight, known as twenty-one, southbound. I think we had four cars and caboose, very sure we had four and a caboose. As I approached Tunnel Hill that day, I blowed the station signal and then the crossing signal. [fol. 149] I begun to blow the station signal at the whistle post, they have a post, I am very sure it is about a hundred yards above there, the crossing board. There is one signal for the station and then one for the crossing. When I got to that station board, I blew the station whistle, one long blast of whistle. The crossing board is about four hundred yards, I suppose, from the crossing. When I got to that, I blowed the crossing signal two long and two

short blasts. I just spaced them by the practice I had been blowing, I blowed a long blast of the whistle, takes about as well as I could tell, about five seconds apart, I didn't use my watch, that's the customary way of blowing them. These were loud and distinct. When I got to the whistling board, as I came on down, there was nobody there or anything on that crossing. There are two tracks at the crossing, passing track and the main line. My cab was on the right hand side of the engine coming south, that put me on the same side Henderson came up on. The passenger track was to the right of the main line. Henderson would get to that before he would get to the main line. It's hard to tell where my engine was when Henderson first came up to the crossing. I was running about thirty miles an hour and his truck seemed to be moving eight or ten miles, I reckon, the way it looked to me, I might have been ninety or a hundred feet away when he ran up on the passing track, it's hard to tell. I mean the engine was ninety or a hundred feet from the crossing when Mr. Henderson ran up on the passing track. I had not seen him before. When I came from the crossing whistle board on down to the crossing, I was looking ahead, down the track. You got to keep your eyes ahead these days on the railroad, liable to run over station flags. There is another crossing before you get to [fol. 150] Tunnel Hill, one this side before you get to Tunnel Hill. I was going to stop at Tunnel Hill. I was about ninety or a hundred feet from the crossing before I saw him drawing up on the track, his car was going up on the passing track, and he was about ninety or a hundred feet, it may be that far or a little farther, it's hard to tell from that distance. The minute he came up on the passing track, I commenced to blowing the whistle, distress signal, it was all done before you could say "how you come on." I ducked down to protect myself from fragments. I had put my brakes in emergency. I had put my brakes in emergency as quick as I could. They stayed on in emergency. I got up and went back to where the truck was pushed off and I think my brake was still on when I went back to the engine. I blew the alarm signal and put my brake on as quick as I saw him. He did not offer to stop when I started blowing. I saw him when he turned his head and this car seemed like it jumped or something. I saw I was going

to hit him. I ducked down behind the boiler to keep the rock, the rock, they generally come through the window, I ducked down to keep the cut glass from hitting me. I couldn't say that his front wheels had got on the main line as I ducked, it was so close. It was done so quick, you couldn't think about it. At the time my engine struck the truck, it's hard to say how fast I was running, I run four car lengths and the caboose over the crossing, I was running about thirty miles per hour, I must have had my speed reduced to fifteen miles an hour. I did not knock that truck off the crossing or drag it off, it hung on the pilot, it broke the pilot brace, there is a brace, I suppose, three and a half inches there, big iron brace. It broke that and the truck stood up on its end coming by my window, it just shoved, broke off. I think it fell south of the crossing. My engine [fol. 151] stopped, I got off and went back there, I jumped off. I declare I can't say where the cab stopped with reference to the crossing, the caboose. I can't say whether it had cleared the crossing or not. When I went back and saw Mr. Henderson, I went back and got the engine and went after a doctor. I don't know who, some doctor there at Tunnel Hill. We loaded Mr. Henderson in the caboose and brought him to Dalton. As close as he came up in front of me there, when he came to that passing track, if this crossing has been smooth and hard, at the speed he was going and the speed I was going, I don't think he could have gotten across there ahead of me, I was too close on him. At the time he came to the passing track and I saw him, there was nothing could have been done, if I could have done anything to have prevented striking that man, or the truck, killing him, and didn't do it, I would have felt like this blood was on my conscience; yes, sir, I feel clear of his blood. If I could have prevented it—I done all that could have been done to prevent striking him, if I hadn't my conscience would feel kind of bothered with his blood. I feel clean. I feel he come to his death of his own hands, not mine.

Cross-examination:

I haven't got the date I went to Doctor Hubbs to be examined for my eyes. I couldn't tell you, I couldn't answer that. Just like any other man, I suppose, is the reason I

went. He ordered me a pair of goggles and he fitted some in. I think he was over Fincher and Nichols Drug Store, I can't recall when, that has been several years ago. I can't recall exactly when it was. I broken one of the lenses and taken them back to him and he refitted me a pair of new lenses, I think it was in 1923. I went up there when he had [fol. 152] his office up there over Fincher and Nichol's store. I don't know how long he had been there, I know he fitted a pair while in his office. He fitted a pair after he moved over to the hotel block. I couldn't say that was in 1923, I think he fitted these goggles while he was over Fincher and Nichols, I won't be sure about that, I know he ordered a frame, a good stout frame—he ordered the frames for me. I don't know whether that was before he furnished the glasses or not, I don't think it was. I think he ordered the frames, I told him some good stout frames, he did not have any when he got the lenses. Then I went back, as he testified. I went back when he was in the hotel building, that was I believe, in April or May one. I had been wearing glasses he fitted on me in 1923, up to the time of the trouble. They kept the sparks out of my eyes and your vision was clearer. I swore awhile ago I could see a mile, you could see it with those goggles or glasses, you could see a long distance. I swore awhile ago I could see a mile, I reckon I could, coming under the Southern bridge the other side of Boyce, and I could see the order board at Boyce, a mile away, you could not see every day, a foggy day, but a clear day * * * I don't use any glasses at all for reading. I am going to Doctor Hogshead in Chattanooga, about my eyes now. I began in August third, nineteen hundred and twenty-five. I never went to see him before that time. I was recommended to him by Mr. Kenner, and I went to Doctor Calhoun in Atlanta. I think it was in January or February, this year, I went to Doctor Calhoun. I haven't quit Hogshead, went to both. I did not go to Calhoun first, Hogshead first. My eyes went blind July twenty-fourth, I mean the twenty-fifth or twenty-sixth, on Sunday morning, when I couldn't see, got up Sunday morning couldn't see my [fol. 153] own face in the mirror—couldn't see my own face in the mirror, couldn't tell a white man from a darky. That was July twenty-fifth, that was the twenty-sixth, Sunday morning. I cannot see through glasses now, I reckon I

would wear them now if I could see through them. I don't wear them. Sometimes I can see just as good with my eyes without them; just can barely see how to walk, look like in a fog, just like walking in a fog, can see four or five steps ahead of me, nearly blind, I suppose I am blind the way I look at it. I say I was coming from toward Ringgold approaching this crossing. There was a little blind crossing above the one where Henderson was killed, I forget the name, they call it a blind crossing, and there's another one beyond shanty, a mile and a half, I don't know the name of that crossing, about a mile and a half. I have been working on the road thirty-six years up till I lost my eyes. I don't know the crossing it is a little crossing north of the shanty. I blew there, gave all the station signals, I did, coming to Tunnel Hill, and at all these other places, blowed, blowed all of them, Ringgold. I have a distinct recollection about blowing there. We were required * * * We blow every time, you don't fail to blow, it's customary. I have an independent recollection of it, I blow all of them, I know I blow at all of them. I couldn't say I have any independent recollection. I am just testifying I blow. There was something to call my attention to this fact on this day. I know we blow, customary to blow at all stations, and it you don't do it, you are liable to get a letter "why didn't you blow" that's why it is so pressing on our minds, more red tape about railroad than anything. I get those letters I say if you don't do it, it says "please advise" it's very easy to * * * It's as easy to blow the signals. Just how I said I always blowed and its the custom to blow. I [fol. 154] say if you don't blow you get letters to that effect. You will know by not blowing. I don't get any. For your information, I have been on the railroad thirty-six years, and I have a clear page, not any writing on my page, that's good. I try to obey the rules. I got several letters about pulling out draw heads, long train, let the brakes release quick and pull out a draw head, "Please advise why you pulled out draw head." I have been running an engine 25 years—yes sir. I won't say I never failed to blow at a crossing. I didn't just say that, you said did I ever fail, I won't say I ever failed. I won't say I never did fail. I won't say that I have failed, I might have away back, but

not here the last several years, I know I have not because they were so tight on us blowing station signals and crossing signals the general public all got so that when a man didn't obey these rules about station and crossing signals, we have got to take care of the public, you have got to look out as you go and take care of the public, that is why the official go so close on us. That is why they want you to blow and be cautious in approaching the crossing and want the crossings put in proper shape. But I blew the station signal, it must have a hundred yards back from the whistling post, station post, something like that, I think. I never turned my whistling cord loose, when I get through my station signal, I am just about the station post and keep on blowing for the crossing. The whistling post must be about a hundred yards behind the regular crossing board, as well as I could tell, looks like that. When I blew the station signal I then blew the crossing signal. I don't blow them both at the same time. I blow my station signal, and then get through with it, I am usually up at the whistle post, I commence blowing the crossing signal. We cover a lot of ter- [fol. 155] ritory by that time. I said I was a hundred yards, and by the time I gave the signal, that is just one long blast, I swore that when I got through with the station whistle I commenced blowing the crossing signal, and I was about the crossing post then and then I blew. It is hard to say, Mr. Mann, how far away I was when I saw this truck, it looked to be about 90 or a hundred feet, it might not have been that far, might have been further, me running that way it is hard to tell. It is a hard thing to tell, he was very close. I know I throwed the brakes in emergency. I swore I saw him when he started on the passing track, that must be about 12 or 15 feet from the main line, I guess it was about twelve feet. When I was a hundred and ninety feet from him then, I did not pass him before he got on there. I saw him, I swear, when he come on the passing track first I saw him—he was driving on the passing track, he was moving. I wouldn't swear, eight or ten miles an hour. I was running thirty. When I first saw him, I shot my brakes in emergency and dropped down. I was going about thirty miles an hour. I did not know the condition of that crossing. I didn't pay any attention to it being a steep approach. That is a steep approach. I had been there over

it once or twice, I believe, in a car. I knew that condition at the time I was approaching this crossing at thirty miles an hour. That is a mile in two minutes. I didn't see him until he drove up on the passing track. I reckon his wheels were just going up on the passing track. I did not see him when he got on the main line. I saw I was going to hit him, I ducked down behind the boiler. I never saw him get on the main line. I saw I was going to hit him. I did not see his engine get killed there, if his engine got killed, I didn't know it. I testified in the trial of the case in the Coca Cola Bottling Works. I did not swear then that he had [fol. 156] been on the crossing some length of time before I hit him, I don't think that I swore that. I didn't swear "but I could not state how long." I don't think I swore it. I don't think I swore it. I recollect what I swore. He ran across the track about ninety or a hundred feet, maybe not as far. I don't think I swore it. If I did swear it—I don't think I swore it. If I did swear it—him staying on the track—it was not the truth; it knocked him off before he had time to stay on the track, it was done in a few seconds. Ben Smith was my conductor, B. F. Smith, Herrod was my fireman. Stewart was my front brakeman. I cannot answer the question where the fireman was at the time of this accident, he was on the engine. I don't know whether the front brakeman was in there sitting on the fireman's seat or not. I was there, but I was looking. I wasn't looking at them that moment. At the time of this accident I didn't see them—two men sitting there, the front brakeman on the fireman's box and the fireman behind him sitting there. Before the accident—I didn't pay any attention to them. We never do pay any attention to how they rode, or what they rode, just so the fireman is firing—sometimes gets up and down on his box. I could recollect it. See them upon the box at the time of the accident? I was looking at the truck, I wasn't paying any attention to them. Before I saw the truck, I don't know where they were, they were over there on the left side, the front brakeman, Stewart, and the fireman were over there, on the left side. I don't know what they were doing, I say. They were not sitting they were talking, I reckon I talk very little. I don't know that they were talking to each other, as they approached that crossing. I don't swear that they

were not because I don't know. My side is on the right side coming here, and that is on the side next to the side of [fol. 157] the railroad that this truck approached. I was on that side. I have a window in that engine, front window and side window. I can see ahead, and I can see down the track. In looking down the track, if your eyes are good, your vision would go out side the track, you can generally see way out in the field if you look. Of course, a man's vision is focused in that direction, you know, his vision goes out. The track is about four feet wide, and something. You cannot look out in that direction and confine your vision to a distance of four feet, of course, your vision takes in a good wide scope. I saw Henderson. I didn't see him, I swear, until he come on the track. The engine is about, I cannot state, the engine is about, from the tread of the track to the top of the stack, I believe an engine is about fourteen feet, six inches or eight inches, and my seat, the boiler is about a foot. I am about seven feet above the track, I woudn't say positive, something like that, just about. The engine that day, I think they run about fourteen feet. I was running the "384" class, I say about seven feet above the tread of the track, I guess. I had a window in front and on the side. If I had been looking down the road, I expect I would have saw him. You could see the passing track, you could see away down to the crossing. He was on the crossing when I saw him. He was on the crossing before I saw him coming up on the crossing. I was back ninety or a hundred feet. When you get that close to the object, the boiler does not obscure your view. You can see plain, not through the engine, I can look over, I can look at a man couple cars, I look over and see him—the running board will obstruct your view, you can look through your window and round the running board, but if you just sit in your caboose, you cannot. You [fol. 158] can by looking out your side window and looking around the running board. Looking through the front window—you would have to get off eight or ten feet, I expect, to see good, could not see until you got up to eight or ten feet. I hit the truck. I don't know the distance it carried it, it broke loose, it hung on to the engine and broke loose, I don't know how far it was back, some few feet back, I think, from where I stopped the engine. I don't

know how far south of the crossing the truck was, I didn't pay any attention to the truck, I ran back to the man. I think he was pretty close to the crossing. I won't say he was nearer to the crossing than to the truck, I think he was pretty close to the crossing. I say he was pretty close to the crossing. I couldn't tell how far south of the truck, I didn't pay any attention. I don't know whether there was any waste put under his head or not. I don't know that he was bleeding. I had no more than got to where he was, I said let's cut loose and run and get the doctor. I don't know how far that corn field is from the crossing there. There is a little corn patch right at the crossing, just down a little bank on the left of that road, right down the bank. I didn't look to see if there were any splinters down there. I don't know Mrs. Herrington. The house right there at the crossing—it is a very short distance, pretty close, I would state it was maybe fifty or sixty, seventy yards. I don't know that it is about that many feet, it is very close, right at the right of way. I don't know where that well is down there that she testified about—her well—I have never been to it. I don't remember seeing it there. I believe I did see them drawing water. I think it was south of the house, a little well or curbing or something, I know Homer Bridges. I have known him a short time, never personally acquainted with the boy. I had him come down [fol. 159] and prune some peach trees and grape vine, I believe he sold them, I bought some cantaloupes from him. I did not buy any fruit trees. I bought some from his father. He did not deliver them, the old man delivered them and put them out himself while he was living. I was not there, some of them died. My wife told me he put them out. I know Homer. I don't know that I saw him in town, don't recollect seeing him in town. He was down at my house and took dinner, pruned some trees and grape vines, he got there about dinner time, I asked him if he would take dinner and he said yes. He did even—I asked him what I owed him, he didn't come after the money but sent a boy after the money. I reckon two or three weeks after that, a week. He come down there to prune some trees at my house. I saw him there. I don't know when that was, that was along in February, I reckon, February or March, along when you prune trees. I don't know the date. That

was after this accident. I didn't have a talk with him about that at my house the day he came there, did not mention the accident. I did not mention the accident and I did not tell him on that occasion in discussing this matter I was sorry it occurred and that I saw him in time to stop but that I thought the he was going to get off. If I had done that, I would have committed murder, I done all I could. I never did have any such conversation with him. I never did. I don't know how Ben Smith, my conductor or any of my crew there that saw this man, got it that I did see him in time and didn't stop.

Cross-examination:

If you are on the right side of the engine and an object comes from the left side of the track, that is, the opposite side, and your engine is close to it—the smoke box extends out even to the pilot beam. I suppose that smoke box is [fol. 160] thirty-six or forty inches around the side of the boiler, you have to look around that from your right or left side. It cuts off your view. That does not affect you if the object is coming up from the side you — on, you have a plain view, you have to look around the smoke box.

Redirect examination:

I was on the right side.

G. F. Hamms, sworn for the defendant, testified:

Direct examination:

I was fireman on the train that struck the Coca Cola truck above Tunnel Hill. In coming to Tunnel Hill, that day, he gave one station signal first, then a crossing signal. The station signal was given around the other side of the crossing signal. There is a marker *that* where the signal is given, what you call the signal post. I don't know hardly how far that station board post is from the crossing whistling board. I guess it to be about 400 feet, somewhere around there. The signal he gave at the station board was one long blow, then the crossing signal, two long and two

short. As we came down the track there, say from the crossing board on to the crossing, I was sitting on the box, left side. The front brakeman was on there with me, Stewart, the accustomed place for him, same box, room there for both of us. When I got to the station board, I was looking down the track, didn't see anything. There was nothing on the crossing then. I was looking that way—at the crossing. Down the track toward the crossing. There was nothing on it. Nothing on the passing track or main line that I seen. If there had been anything there, I would have seen it. In coming on down, nothing happened, coming on to the crossing, I never did see anything, not [fol. 161] until he began to blow, to blow the distress signal. I had seen nothing until he blew the distress signal. Nothing come into my vision at all. I couldn't say how close my engine was to the crossing when he blew the distress signal, a hundred feet, or seventy-five, or a hundred feet. When he blew, I leaned out and looked ahead, leaned out the side of the window. I saw him coming on the track, this truck coming, Coca Cola truck. He was first coming off the passing track on to the main line. By that, I mean the front end of the truck. At the time he blew his danger signal, he put on the brakes, emergency application. They remained on in emergency until the train stopped. From the time that I saw that truck, after he blew, he kept on blowing and I had to get down out of the way, I jumped down behind the boiler to keep from getting hit. The truck had got on the main line when I jumped, just got to the main line. I couldn't tell you how quick between the jump and the hit, when I jumped and he hit, it was done so quick. So quick I can't tell it in seconds. The train run four or five car lengths after it hit him. I come back to the truck. The cab stopped, with reference to the crossing it just cleared the crossing. I would say that the speed, before he put on the emergency, was thirty or thirty-five miles an hour. At the time we struck the truck, I would say that the speed was around ten miles an hour. From the time that the emergency was put on, there was nothing that could have been done to have prevented striking him, that I know of. There were five cars in the train, counting the caboose, four and the caboose.

Cross-examination:

I was fireman on that occasion. I was sitting on the fire-[fol. 162] man's seat box. I was sitting in the cab of the engine, in the cab. The front brakeman was sitting between me and the front. There was a place reserved there for him, sitting in front of the fireman. That's the way they have it, the fireman sits behind. He blew the station signal. Something happened on the crossing impressed it on my mind, I suppose. When anything happens, enough to impress it on my mind, it does, and then I begin to think back. The station signal was blowed at Ringgold. I remember that, it is part of my job to look out for such as that. We did not have anything to happen there. There might be some of these signals on every run and every station I overlook, never, though, if anything happens. Then I heard the blow post signal—that was two long and two short blasts, five seconds apart, that was the crossing signal. I heard this. They were five seconds apart, something like that. I remember it all the time. I was sitting there with that brakeman, he and I were not talking. Didn't speak a word from Ringgold, Georgia, not that I remember of. I don't think we might have been talking and that I would not remember it. Didn't speak to him since we left Ringgold.

Q. Where was it you first saw the truck?

A. When it was about something like a hundred feet from the crossing. I was a hundred feet from the crossing, somewhere around there, guessing at it. I leaned out the side of the window and saw it, out the side of the window. I hadn't seen it, I say, until after he blew the alarm signal. We were running, I think, thirty or thirty-five miles an hour, somewhere around there. I was guessing at it, that he checked the train running a hundred feet from thirty-five miles an hour to ten miles, you can stop pretty [fol. 163] quick with an emergency brake. I don't know that I took a pretty long guess at it. I don't know whether the train would go head over heels if it was stopped that quick or not. I was kind of going by how far it run. It run about five car lengths past the crossing. The engine was down that way, towards the culvert. I don't remember where the culvert is. I have been running six years, I

don't believe I do remember exactly where the culvert is. When I looked out the window, the truck was coming off the passing track on to the main line. I don't know how long it would take a train running thirty-five miles an hour to run a hundred feet. That's about all the time you would have, to look out the window. As to whether it would be knocked off running that distance, I don't know how long it takes to run it, before I could look out the window, after we put on the emergency—I don't know. I don't know. The front end of the boiler would obstruct my view in getting up close, besides the man sitting between me and the window, from the crossing. I don't know exactly how close we would get before the front end of the boiler would obstruct my view. I could have seen further up from my side, up the railroad, if I had been there, it depends on how close it was, if I could have seen anything approaching that crossing. If I had been looking out that way, maybe, I could. I could. I guess the engineer, if he had been looking there, could have seen it approach that crossing from his side. I don't know how far he could have seen that truck approach that crossing. I don't have any idea. I don't know how far he could see. The track is straight down there after it comes around the curve. I don't know how far it is straight. I don't think it is a mile and a half. It might be a couple of hundred yards, two or three hundred yards maybe straight. [fol. 164] After the engineer got there in the straight, nothing would prevent him from seeing anything approaching that crossing. If he had been looking he could have seen the ton and a half truck approaching that crossing, looking out in the field, because there is a field there. He might have come through the field. If he had been looking out that way, approaching that road where people travel, there was nothing to have prevented him seeing that, if he had been looking. I don't know what he could see.

J. B. Stewart, sworn for the defendant, testified:

Direct examination:

I was the front brakeman on this train that struck the Coca Cola truck here at Tunnel Hill. I was riding on the fireman's side box. I have been running on the W. and A.

Railroad here fifteen years, coming to Tunnel Hill that day, the first signal given was the station signal, the first signal blown was the station signal, one long blast of the whistle. That was blown about a half a mile, I suppose, from the station, between a half, maybe—maybe a little over a half. There is a marker there where it was blown, station whistling post. My idea is the crossing whistle post is about a hundred feet from there. Coming on to the station board, the crossing signal was given. That was blown at the whistle post. It is about four hundred yards from the crossing. That signal was two long and two short blasts of the whistle, about five seconds apart. As near as you could guess it, between each blast of the whistle. They were not indistinct low blasts, they were loud. I was looking to the front, ahead of it, down the track. After I got by this whistle board, coming down there, I had a clear view of the crossing, after I got by the whistle board. There was nothing on that crossing. I was looking at the [fol. 165] crossing. I could not see anything on the passing track or the main line. I have good eyesight, pretty good. I am forty-two years old. As I came on down to the crossing, I—I imagine the front of the engine obscured the passing track, or began to, something like a hundred feet from there. When I got down as near as a hundred feet, say 150 feet, to that crossing, 150 feet from the crossing, I had a clear view of the main line or passing track, nothing up on either of them, could not see anything. I was looking at it. It was not there. The first I knew of anything coming, was when he blowed the distress signal and put his brakes in the emergency. He did those things about the same time, began to blow, put his brakes in emergency. I had not seen anything until he did that, and it was about a second after he begun to blow until I seen anything. I stuck my head out and saw the wheels of the truck coming on the main line, just coming on the main line then. The truck was not stopped. It was moving the last time I seen it. When I was that close to it, I knew we were going to hit it. I got down off the box, afraid something would come back there and hit me. There is a place reserved for me right there on the front end. The fireman frequently has to get down and put in fires. I keep a lookout when I am up there. I was doing it on this occasion. The fireman

rides back of me because he has to be back so he can get down, so he won't have to pass in front of me. I imagine he was running about thirty miles an hour before he put the brakes in emergency. After the brakes went on in emergency and he hit the truck, my idea would be we were running between fifteen and twenty miles an hour. I went back to the crossing after we stopped. We had four cars and a caboose. The cab cleared the crossing three or four [fol. 166] feet, I should think, maybe a little further.

Cross-examination:

I was front-brakeman. I did not spend most my time, myself and the others, watching the engineer,—no sir. It is part of my job to superintend his blowing before we get to the crossing, don't have to watch him. It is part of my job to see that the signals are blowed, the engineer does that. It is not part of my job to watch the engineer, I don't think so. If he failed to blow you cannot hardly tell sometimes whether they would "jack me up" with a "red letter" or something of that sort. If you were to get in any trouble, they would send you a letter to please advise so-and-so. We always try to work to stay out of it. When we get one, we have to get out. I am not afraid of those fellows down there. You must remember that your life is at stake, too. We always tell a straight thing about the whole thing. I was not watching the engineer, but he blew the station signal, and then he blew the other. He blowed at Ringgold and every other crossing above there—and the other crossings between there and Tunnel Hill, I remember that myself. I couldn't say as to every one we passed, part of the time I wasn't on the engine. I am not going by the custom and rule. He blowed two long and two short blasts, I say. As near as I can guess at it, five seconds apart, I would not say. I noticed that at the time he did it. He began to blow the station signal at the whistle post. The station signal post is beyond the road crossing. The whistle post is about 400 feet north of the crossing post. The station whistle post is about 400 feet from the road crossing whistle post. When we got up there and blew that station signal, it was about 400 feet from the crossing

[fol. 167] post. He blowed the road crossing signal when he got to the whistle post. I said 400 feet. He got up there and blew that signal, one long blast, then he blowed the road crossing signal.

Q. He stopped there to set down on his seat?

A. Beg pardon?

Q. Did he sit down on his seat and quit?

A. He did until he got stopped. He blowed it with his cord. I couldn't say whether he turned it loose or not. I was looking ahead. I didn't see him blow, he blowed it, I heard it. I was there on the other side, just across the aisle, just a little aisle between us, right close to him. I just wasn't looking over there. I was looking straight ahead. As to blowing the signal blast for the station and immediately blowing the crossing signal—it is just 400 feet, you know, it just takes a few minutes, few seconds, up to the road crossing. At the rate that train was coming, it didn't take very long. I was not talking to anyone. I was sitting right there by Herrod. I had been sitting there ever since we left Ringgold. If I spoke a word, I don't remember it. I could see the truck approach the crossing on my side, before I got on the crossing. I could see something like 200 feet from the crossing. I could have seen it if he had been on the crossing by looking straight ahead. I could not see it approaching from the road, not from down in the road. I could see it as he come up that steep embankment, I could see the embankment. The reason I didn't see it, I don't suppose he had got there. He could not have possibly got on the railroad without coming up there. I was looking, I suppose we got so close. I wasn't looking at the dirt road, I was looking down the railroad. I wasn't looking down the dirt road, I was looking * * * now, suppose I was looking at these doors straight ahead of me (court room door) that is wider than that from the dirt road [fol. 168] to the railroad. I guess it is 25 or 30 feet to the back of the house. Just looking back there, you can see both of the doors all right—the further you get, the vision expands and you can see wider. If I had been looking down the track a hundred feet, if I had been looking at the dirt road I could see it. I was looking in that direction. There was nothing to have prevented the engineer, sitting on the opposite seat, to have prevented the engineer seeing a

man coming there if he had been looking when that truck approached there before it got on the track, I think not. I don't know whether I testified before that he could see it down the road from his side, or not. I couldn't say now whether that is true or not, I should think he could see it. When he began to blow the distress signals and put his brakes in emergency, my attention was attracted. The first I seen of the truck, it was rolling up on the mainline. It was a second or two, after he gave the alarm signal before the truck ever appeared on the main line. I was looking out the window when the truck rolled up on the main line, that is the first I saw of it. When it got on the passing track, I couldn't see around the boiler then. When we hit the truck my idea would be, we were running fifteen or twenty miles an hour, when we hit it. We were running about thirty miles an hour until he put on his emergency brakes. It wasn't but just a short time until we hit the truck. I couldn't say how long it takes to stop a train putting on the emergency with that number of cars; the faster it is running the bigger the train, longer it takes to stop. You can stop a short train quicker than a long one. The stopping of them depends on the rate it is going.

[fol. 169] Redirect examination:

The company does not require us to tell lies when we get in trouble. I ran with Mr. McCollum, as brakeman, both before and after the accident. I did, at times, give him signals from a distance, sometimes close to him. I did not notice anything wrong with his eyesight until just before he quit, the day before he quit, was the first I noticed. I don't know what month it was. It was when he quit the railroad. Up to that time, I had noticed no trouble in him getting the signals, none at all. I gave the signals with my hand, and lamp, too; sometimes at a long distance to him.

Recross examination:

With that truck coming up there, I swore there was nothing to prevent him seeing it then if he was looking—there is one road coming across the railroad and one going straight on, he would not know whether the car was going upon on the right or not. If he didn't see it, I cannot explain.

BEN SMITH, sworn for the defendant, testified:

Direct examination:

I don't live here in Dalton, I live out in the county. I have been living here, off and on, twenty-five years. I am a conductor on the W. & A. Railroad. I was conductor on the local freight train that struck the truck up here. As I approached that crossing and some distance back of that crossing, I was checking my local freight bills. I was down in the caboose, sitting on the box. I could not see down the track from down there without sticking my head out the window. I was engaged in my work. I did not pay any attention to any signals, or anything of that sort, not [fol. 170] until he blowed that distress signal. That attracted my attention. Up to that time, I had not paid any attention to signals at all. When he blew that distress signal, the brakes went on in emergency about the same time he blowed the signal. I did not see a bit of this collision. It was all over when I first got out to see it. The train was standing still. I guess we cleared the crossing with the caboose about six feet, six or eight feet, I don't think over that. When I got out, the truck was laying along side the caboose, clear of the main line, room enough to walk between the caboose and the truck. I do not know the length of the caboose, I believe it is thirty six feet, about that, I think. Henderson was lying, with reference to the truck, a little ahead of the truck, a little this way, the truck was headed south. When I seen him lying there, I seen his head was bleeding and I think I got a piece the engine off and got a doctor. I did that. And put him in the caboose and brought him to Dalton, the doctor looked at him, didn't know but what he could do something for him. I had been running with Mr. McCollum, him as engineer, before and after this accident happened. It was often necessary for me to give him signals, some close to him and some far off. Up to this time, and some time afterwards, I never noticed anything wrong wtih his eyesight. I did give him signals and he heeded them, I noticed nothing wrong with his eyesight until he had this trouble about Calhoun, after he had the sunstroke. I did run with him sometimes after that, up until about the time he quit the company. The first time I knew of it was when

he stopped off. I was working right with him at the time of the accident. He could see a signal, as given, as good as anybody pulled me, and always did. Occasionally, he had orders to read to run by.

[fol. 171] Cross-examination:

I did not know he had been to the doctor, I did not know he was near-sighted, I did not know one eye was a great deal worse than the other. I don't swear it aint so, I say I don't know, I won't swear, I don't know anything about it, I heard that in the last few days, one eye * * * I have not heard he was blind, I have seen him walking on the street. I did say he was nearly blind now. I have seen him walking on the street once and a while, possibly, oh sometime, I don't know how long. I believe he had on glasses. I don't say I think he was about like he is now when I was running with him. I understood for sometime one of his eyes was gone out, but I don't think he is blind, maybe blind in one eye. I don't think he is blind in both eyes. He told me himself one of his eyes was gone. I don't remember what he said about the other one, he told me about it during this last month. That did not make it not so because I didn't know, I don't say it wasn't so. I didn't know anything was the matter with his eyesight until this year. I don't think I knew he went totally blind a year ago. I don't think I heard of that. I was conductor on this train. I heard the distress signal. I did not hear the station signal, didn't pay any attention to it. I was busy. I knew the signal. I don't think he could have been more than four or five or six cars from the crossing when he give the signal, I couldn't tell you, I didn't look straight out the track to see, I couldn't have well done it, if I had crouched out the window there was a bench there, I could not see straight out the window. I knew it did occur, when we stopped; Henderson was still alive then, I knew he was hit; still alive; he was not lying there on the track, he was down in between the track, between the two tracks, south of the crossing. He was a little bit further down than the truck. [fol. 172] I certainly do remember having a conversation with you about this matter down here at the bank. I told you I thought he killed himself trying to save the truck, and I think from the view he had of the train he

ought to have jumped out. I don't remember when it was, I remember the time. He had a perfect view of the track, that is the reason I make that statement. I hadn't heard Faith say: "He stood there on the track trying to get the truck out of the way, and stood there with the truck on the track trying to get it out of the way." I hadn't heard Faith say that, Faith said he saw him drive on the track and it looked like his car re-bounded and he didn't make any effort to jump, but stayed there. I don't remember what Faith said. I don't remember being a witness in the Coca Cola truck case, I was on the stand once about the case. I don't remember now if I had been on the stand twice. I guess I swore in the Coca Cola case that I heard Faith say that I did not get the information from Faith. I got, I base my idea on the view he had there, he could have seen that train. As to my saying I got the information from the brakeman, I don't remember swearing any such thing. I base my opinion—I didn't see a bit in the world. He ought to have jumped out, let the truck go. I said he lost his life trying to save the truck because I think he got good enough view to jump out when he saw the train. I don't—stating and swearing that I got my information from Faith, my brakeman, that he was standing there trying to save the truck. That's all I know about it. I don't remember swearing about it.

Redirect examination:

I don't remember if the whole crew was discussing it, all I remember is what I seen and what I know. E. F. Pritchett, [fol. 173] sworn for the defendant, testified:

Direct examination:

I was one of the rear brakeman on the freight train that struck the Coca Cola truck above Tunnel Hill. Coming down to the crossing, I was in the cupalo on the east side. This little "dog house" build on the top there. There is a little seat up where I sit, windows in it. I was on the left side coming south, off side from where the truck come up on the track. Coming down there, the crossing signal and station signal were given; the station signal was given before we got to the station whistle post. I suppose that is about 300 yards from the crossing whistle post; one long blow,

When we got down to the crossing whistle board, two long and two short blasts were given. They were loud. I was just looking ahead out of the cupalo window, as we came on down there. I never saw the truck before it was hit. Never saw it at all. The first I knew of any trouble was when the brakes went into emergency and the distress signal. I never saw the truck. I was sitting on the left side of the train and the freight cars all ahead of me, had box cars in there.

Cross-examination:

I was not expecting any trouble that day. I always watch to see whether the engineer blows the station signal. That is part of my job. That is the rule, to watch out, that's our rules. I am not excited, that is part of my job. I am going by what my job requires, sure. I watched the engineer coming into Ringgold, he blowed the signal. I won't say I remember every day that he runs that he blows the station signals, because I don't remember it just day in and out. Of course it is my job. I suppose I neglect something on my [fol. 174] job sometimes. I was not expecting anything approaching that crossing. I was just sitting up there listening on this occasion. I don't know whether it requires my supervision from the rear to see that he does his duty, to watch him, to see whether he performs his duty or not. That is part of my job to watch. It is his duty to do those things, to blow. I remember so distintly about what occurred on this occasion, something happened, something did happen. Nothing happened at Ringgold. I just remember it. I do remember him blowing, because he is the best man I have ever seen to blow the signals. I had to watch close to see that he blows them. If he didn't do it, I wouldn't do anything about the crossing signal, but if he had a meet order and didn't blow his signals I would do something, I haven't anything to do with the road crossing, not a thing. It is part of my job to listen. I was on the east side, that is not the side next to the engineer that is the off side, the side the fireman is on. I was sitting up there in the cupalo. I had been sitting there ever since we left Ringgold. When he blew the station signal, I suppose that is about 200 yards above the crossing signal, I don't know the distance, about 200 yards, I suppose, I don't know, I guess it is about 200

yards. I heard him blow there. That occurred just a few seconds before he blew the crossing signal, just a few seconds. I don't know how long it takes him to blow it. I never timed him. I didn't take out my watch and time him. I couldn't tell you how many seconds apart, I don't know. He gave two long and two short blows. I don't know how [fol. 175] far apart. I never did see anything at all. I don't know. When we first came around the curve there, I could see the crossing I suppose, about 1200 feet, when we first came around the curve. I was elevated. I could not see anybody approaching the crossing from my position. I could not see them on the right hand side the the train, on the west side of the track, where I was sitting. I could not see to the west side anywhere of that crossing. Not from where I was sitting, I could see the crossing by coming around the curves, you see. Fread Faith was up there with me, was on the west side. Fred Faith, I couldn't say exactly how close the engine was to the crossing when I heard the alarm, I suppose about, something like, I couldn't tell you, I don't know the distance. I don't know the distance, I suppose two or three hundred feet when the brakes went in emergency. I haven't got any subpoena, nothing only by the railroad order to be here, ordered me to be here, they are paying my time and hotel bill; they just told me to come and I come, I am still working for them.

Redirect examination:

I could not tell anything about how far the engine was from the crossing when he blew that danger signal, two or three hundred feet, I suppose. The train was between me and the engine. I suppose the man on the engine would have a better chance to know how far he was from the crossing when he blew the danger signal than I would.

Recross-examination:

I said the train was two or three hundred feet when the [fol. 176] emergency went on, I don't know the exact distance.

C. F. Faith, sworn for the defendant, testified:

Direct examination:

I work for the W. and A. Railroad. I was one of the rear brakemen on the local freight that struck the Coca Cola truck. I was riding in the caboose cupalo, on the right hand side. That is the same side the truck came up on. Approaching Tunnel Hill, that day, the station signal was blown and the crossing signal. The station signal was blown at the station post, that was one long blow. I couldn't say just how far the station signal is from the crossing whistling board, a little short distance north of the crossing whistle. I would not give you the distance, I could not say any distance, not very far north of it. At the crossing whistling board, two long and two short signals were given. They were pretty loud blasts of the whistle, as loud as we always blow. There were four cars between me and the engine. I could see the crossing all the way from the north switch after I got on the straight. I have no idea as to distance. It is a pretty good little distance back to the north switch, not a quarter of a mile, eighth of a mile, something like that I guess. I didn't look down until after the distress alarm began to blow and the brakes went into emergency. When I looked out, I saw the truck coming up on the passing track. It gets to the passing track before the main line. It was coming up on the passing track, it was still moving. The engine then, with reference to the crossing was a little north of the crossing, I couldn't say how far, I couldn't tell the exact distance, a hundred feet, I guess, something like that. I looked out when he blew the danger signal, when the brakes went into emergency [fol. 177] and he blew the distress signal. I looked out the window, the side window, leaned out you didn't have to lean the cupalo is high up, I struck my head out of the window. He had not come on the main line, just on the passing track. Nothing wrong with my eyesight, if there is I have never known it. I am forty-two years old now. After I saw him come up I watched him. I thought maybe he would stop before he got to the main line. I thought probably he would stop before he got in the main line. He never stopped before he got on the main line, he slowed up, looked like, and shifted gears and the car jumped, I saw the car go five

or six feet out of my sight before we hit him. That happened in a short time. He was almost on the main line and it was done in an instant, it looked like after he shifted the gears, the car picked up better speed and started across, he just started and about that time we hit him. The shifting of the gears and the hitting was almost the same time. From the time he blew, from the time I saw him coming up to the passing track, there was nothing whatever that could have been done that was not done to prevent striking that man, because the brakes were put in emergency. That's all you can do, draw the air off. I claim he made a good stop. He was running about thirty miles an hour when he put the emergency brake on. He was running about ten or twelve miles an hour when he struck the truck. The rear of the caboose was over the crossing, I couldn't tell the exact distance; didn't measure it, kind of excited and tried to get the doctor, I run and cut the engine off, it looked like the cab cleared the crossing six or seven feet. The truck was laying right near the caboose. Henderson was lying a little south of the caboose door, the door of the caboose was in the middle and he was lying a little south [fol. 178] of the caboose door between the passing track and the main line. People approaching the crossing in the country they drive up there and wait for us to get by. I have seen lots of them do that. This dirt road as you come up, it forks before you get to the crossing. One forks before you get to the crossing and the other goes up the main line. If a man could see a person in the dirt road, he would not know whether he was going up on the crossing or going straight on, he would not until he got on the crossing. I worked around Mr. McCollum as brakeman before this thing happened, and after too. As long as he worked here as engineer, and me with him, I gave him signals, some near to him and some far off. He appeared to see these signals and heed them. I never saw anything to indicate trouble with his eyesight until he quit the road. Engineers approaching stations they have what you call station boards and order boards there. An engineer has to see them for some distance to know whether he is getting orders or not. He appeared to heed these boards and stop when they were against him. It is necessary to see them a long ways ahead to tell these at all times, lots of places you

have to see a good piece ahead. I was with him on this trip when he was overheated at Calhoun when his eyes went bad. They went bad before he got back to Chattanooga the next day. He has never offered to run an engine since that time, he had not been on the road since. That was some time during the past year. It was something close to a year after this accident happened.

Cross-examination:

I give him these signals I am talking about all over the road, from one end of our division to another at every station. On a local freight we generally work at every [fol. 179] station and it naturally takes signals in order to do this work—takes signals, because you don't have time to walk and tell a man. I never tried him a mile away on no occasion. I never had any occasion to give him a signal that far. I never said he went blind, I said his eyesight went bad on him. The first I knowed of it was about Graysville, going north, the next day after he got overheat at Calhoun. We were switching cars at Calhoun when he got overheat. He was handling the engine for us to switch them. I began to notice the next day that he could not see signals. He was on his engine of course. I didn't say that he went blind down at Calhoun, I say that he got overheat at Calhoun. He claimed that affected his eyes there, and I say that I didn't notice it until the next day. He was still running the engine the next day, he run it to Chattanooga. I began to notice it at Graysville, and he was still running the engine across public crossings. I didn't say how near blind he was. I said I noticed his eyesight was going bad on him the next day. I didn't have to tell him about it, he quit when he got to Chattanooga. We went to Chattanooga with the engine. I did not know he was near sighted, but I am not an eye specialist. I didn't know any thing about that. I was just swearing that he always seen the signals up to that time. That's what I am swearing now. I did not know that he was nearsighted. I did not know at the time of this accident, a year and a half before that, that Doctor Hubb had fitted glasses for him. I did not know that one eye was better than the other. We had a fireman on this engine. He watches signals and tells the engineer what to do when we

are switching on his side. The fireman has a certain place he stays. He has to sit there most of the time. He has to watch on his own side when we are switching [fol. 180] around stations. He has a box over there, where he sits and looks out the window. He didn't have to look thru a brakeman. Have to put a brakeman in front of him he has plenty of space to see around. He don't have to look thru him. The front brakeman rides in front of the fireman always. The reason that I was watching about the signals that day at Tunnel Hill, that's part of my duty to watch about all the signals. Mr. McCollum comes as nearing blowing at all of them as any man that ever run an engine. That's part of our duty, to watch for him, we all have so much to look after. If he don't do it, then I can take other action later. I would report it. I would if necessary. If it was necessary I would. That is our duty to report anything carried on wrong. I did not report that McCollum was blind running that engine from Graysville to Chattanooga, he came home and hasn't been back. I didn't know he was blind at Graysville. I said that he could not see the signals as good. There wasn't another man to put in his place. We had other engineers but not at Graysville. They had two men on the engine with good eyes. We didn't have them all the time when the signals were given, not when we were switching. He blew the station signal at the station post there. I don't know how far that is north of the crossing it is some distance north of the crossing. I never measured it, I don't know how far, pretty good little distance. When he blew that he come on down and blew the crossing signal, just a short time apart, they are not very far apart. I wasn't watching him on this occasion when he approached the crossing, until the emergency brake went on and the distress signal. That is the first time I noticed it, when I looked out of the side window. I recollect that he blowed all those signals [fol. 181] before that. I first saw the truck coming up on the passing track when I first put my head out the window, he was coming up on the passing track when I first saw him. That was after the emergency was given, it was done on and the distress whistle was blowing. He was coming up on the passing track. There wasn't anything to prevent the engineer from seeing Henderson when he was ap-

proaching the crossing, seeing the truck, he could see him, that's how he begin blowing the whistle signal. The track is straigth to the north switch from the crossing. From the north switch coming south, the engineer is on the right hand side, that's the side the truck was on. I told you there wasn't anything to prevent the engineer from seeing the truck approaching that crossing. He couldn't have seen the truck before it got to the passing track, very far. You could see the truck plum down in the road all along there from his position. I swear that he could see it anywhere there along in the road not when he turned from that main road up to the railroad, anywhere in that road. I never measured the elevation above the road of his engine. I couldn't exactly say. If I had been on the engineer's position with my good eyes, I could have seen him anywhere down in the road, anybody could, and I could see as he approached there before he got to the crossing, easily. I don't know how far away from the crossing before he got there, he could have seen the truck, I never measured it. I testified before he could see it at least seventy-five feet before he got to the first track, something like that, down the side of the road. There was nothing in the world to prevent it so far as I could see. I am pretty familiar with that ground and crossing. I have been running there about twenty years. When I first saw the car, it was coming up on the passing track, when I first saw the truck. That was after the emergency had been put on and the [fol. 182] stock alarm given. I couldn't say just the distance the engine was then away. I was four cars behind the distance, we were some little distance from the crossing, he had time to get up on the main line before we hit him. He got on the main line, I wouldn't say that he killed his engine. I think I did testify in the case of the Coca Cola truck that is since the accident. I recollect that certainly. I don't know as I swore "That when he got on the main line looked like his car was killed, or something and he sort of went back and then seemed to go ahead, looked like the engine was killed, and then he tried to go ahead," in them words. Best I recollect, looked like he tried to shift his gears and go ahead, when he got on the main line, I didn't swear it looked like he killed his engine. His front wheel was just going on when he looked

liked he shifted his gear and the car kind of went back and picked up speed. I won't swear now it looked like he killed his engine. I didn't swear that he killed his engine; looked like he shifted his clutch. It didn't look like he dropped back in there, killed his engine and struck that rail down there and rolled back. I don't think I swore that before. I don't think I did. I think I was paying as much attention to what I swore as to the engineer blowing blast on the engine. I think I am telling it like I did before, or about like I did before. I have not discussed it with anybody since I swore before. I have not talked to Mr. Neel, I thought it was settled, I haven't talked to anybody, I thought it was settled. I thought it was done out of Court, I wasn't figuring on attending court any more. I have been figuring on it in this case in the last day or so. I have not talked to anybody about it. I talked to the lawyer about it a little. That is somebody, I suppose he is some-[fol. 183] body. I didn't say that Mr. Monroe Neel wasn't anybody. I thought you had reference to talking about it down stairs. I didn't know you meant any body connected with this case, George Taylor, Monroe Neel or some of the others, because the other time you accused me of talking to some one in the yard.

Question: That was the time you told Ben Smith you saw him in time but you didn't stop, thought he would get off?

Answer: No, sir. I don't know anything about that. What I had reference to was you accused me of talking to somebody in the yard here in the other trial. I did not talk to somebody in the yard. I told Ben Smith we knocked the truck off. I did not tell him that Henderson got killed by trying to save the truck, get it out of the way, don't know as I did. I don't know as I did. My recollection fails when I don't know what I am talking about. I did not tell Ben Smith in the presence of these girls—there was no girls there. I did not tell him. Go ahead and ask the question—when you go to bringing girls in, I know, I didn't see any women, not where I was at. I was there when Henderson was killed, I saw him. I didn't see some women up there, not where I was, none close enough to talk to. I did not tell Ben Smith, my conductor, that I saw him in time to stop but that I thought he was going to

get off. I did not tell him that he was trying to save the truck, get it out of the way, trying to start it. I don't know how I got the information and didn't see it, I didn't tell him that. I was one of the brakemen. I don't know, Old Man Ben Smith might be a girl, me and him put the waste under his head, me and him he might be a girl I don't know. I have told all I know about it.

[fol. 184] A. G. Patterson, sworn for the defendant, testified:

Direct examination:

I am not now section foreman for the W. and A. at Tunnel Hill. At the time the Coca Cola truck was struck, I was. Prior to that time before it was struck, I did some work on the crossing, repaired the crossing. I had went there with section men, took out all of the rock and dirt that was in the crossing and throwed it out and put new ties in under the rail there and refilled it in there with ballast rock, that is the kind of rock that is usually used in the crossings. I had not dug up any of the passing track at all. I had dug up all of the main line, and out beyond about ten inches, outside of the ties. That was about a couple of months or more before Henderson was killed, I don't remember, several weeks anyway. Travel would tend to knock these rocks down, it would work them out. After that, from the time I fixed it up, from time to time, I had refilled it a few times with rock where they worked out, raked it back up. The rock would come about an inch above the rail at the center of the track and then slope down to the rail at the side. I had raked it up on Saturday morning before Henderson was killed, two days before. I went over the crossing the morning he was struck, about seven o'clock on my motor car. The condition of the crossing that morning, it looked to be in pretty good condition that morning. Safe enough to get over it. The track north of there is straight several hundred feet. I made some measurements of that there. It is straight seven hundred and forty two feet, I believe north of the crossing, something over seven hundred feet. A person on the crossing could see the train approaching fourteen hundred and eighty odd feet, that is, until it gets around the curve. A person coming up that road from Tunnel Hill

[fol. 185] towards that crossing, could see a train as it approaches from the north. Say he was a hundred feet from that crossing, he could see the train up to the switch as far as the straight goes, that is something over seven hundred feet. I have been there when trains are passing and saw how a man could see. After he was struck, I received word and come back and moved the truck. I got there about eleven o'clock. The crossing had been scoured up some. It looked like the wheels of the truck had been drug around the center of the crossing, the front wheels, on the main line. It knocked the rock out of the crossing, I had them raked back. There were no marks of the rear wheels on the main line, in the passing track it looked like where they had been turned around, scoured around. The height of new rail is about five and a quarter inches. The width from between the west rail of the main line and the east rail of the passing track is eight feet and three inches. The width, guage between them the rails of the passing track is four feet and eight and a half inches; eight feet and three inches between this passing track and the main line.

Cross-examination:

At the time Henderson was killed I was section foreman for the W. and A. Railroad at Tunnel Hill—I don't know when he was killed, I heard he was killed. My father came after me, about eleven o'clock I guess. I couldn't say. I went down there. I tore up the tracks some few weeks before that, I don't know just how long before the accident that I overhauled the track. On the main line, I had took all of the rock and dirt out down to the bottom of the ties, throwed it out and put in new ties and refilled it with new rock. I took it out on the side of the ties just about eight [fol. 186] or ten inches, just enough for a shovel. The ties come back from the rail, the track about nineteen inches, some of them are different length. The east side was the regular side of this, that was not the side that runs out towards the passing track. That road runs east and west, but we call it the road running north and south. We figure the passing track is on the west side. The ties project nineteen and a quarter inches on this side and nineteen and a quarter to twenty inches on the other side. We did not jack up the tie. We pulled the spike out

of the cross tie and jacked up the rail. I couldn't say how high we jacked up this rail. I guess eight inches to get the timber out. The surveyor put stakes along to jack up to after I put in the timber. We pulled it eight or ten inches to get the ties out. I don't suppose we raised the track more than six inches when we surfaced it. I had to get the cross ties out, we raised it up a little and left the ties in and lifted them out. The engineer came along and would put up stakes for me to go by after I had put in timber. Then I had to raise up to the stake. That was about six inches I guess. I had to raise it up that way, something like that. I cannot tell when I did that. After I put in the timber and excavated there, it remained in that condition for a month or two. I don't know how long—month or two. Then I come back and smoothed the crossing, that is, that is pulling up the low places and tamping it up, and then I filled it in again with the same kind of rock that was in there. It was not unfinished. I could not take it with me, I had to leave it. I couldn't take it with me I had it finished with rock. I said that after we put in the timber, they set the stakes and I raised it about six inches and then refilled it with new rock, new rock same kind that was in there. I cannot tell when I did [fol. 187] that, I don't remember how long before the accident. New rock I did not put on any screenings then. Put them on a good while after that, two months I expect after that, I don't remember how long after Henderson was killed, in two or three weeks, I guess, I don't know exactly. I left it in that condition with these loose rocks put in there for the public to travel on, that was all they used then for a crossing. That did not leave the crossing so very rough. It is a little rough when you dig it up and raise the tracks and put in new rock, until it settles down, it soon settles back down, by people going over it. It is not so awful rough, not what you would say awful rough. It is just loose rock. You have to keep filling it until it gets settled. That is the condition I left it in. Bryson was the regular track walker, J. W. Bryson, at time. I don't reckon he is here, I don't reckon he is I haven't seen him. I think he was here the last time we had the trial, as well as I remember, I don't think he was introduced, I don't know, I don't remember now. I don't

know that he was not. I don't remember that he was introduced. He is not the man that did the track walking, looking after it, the day this accident happened—not the day the accident occurred. He had been up to that time the track walker. I don't remember all the men that filled this in on Saturday. E. M. Campbell was there, he helped fill in; J. M. Morgan helped fill in; B. L. Clark helped fill in. He is here. O. A. Vest helped fill in, I am sure of that. I was standing there. That was on Saturday morning before the accident occurred on Monday—Saturday morning. It took them about ten or fifteen minutes to fix that. I cannot explain how these cars stalled there on Sunday after I fixed it on Saturday. I hadn't heard nothing about them stalling on Sunday, hadn't heard a thing about it. [fol. 188] I was section foreman. I passed there again Monday morning. My supervisor of roads came up there that morning, on Monday, with a work train, on the day the accident occurred. He lives here in Dalton, somewhere; he is still supervisor. I don't know that he was here when we tried the Coca Cola case, as a witness. He was around here. I have seen him here in court since then. I don't know what his business was, he has been around the court house this morning. I don't know whether he is out there or not. I don't know whether he knows all about the condition of that track or not. I don't remember how long after I was there this screening was put in, I don't remember how long. They changed the plan on it so you could put in the screening, after that. They did not use any screen at that time, not up there. I don't know that they have always done it. I couldn't say about the cities. I am talking about the job up there I am not here as a witness for the city. I have never paid any attention to the crossings, have never seen him out inspecting crossings.

Redirect examination:

The day this accident happened, E. M. Campbell, was my track walker. Ritchie supervises from Chattanooga to Kingston and to Rome, I was on that section.

Recross-examination:

Mr. Bryson did not notify me on the Saturday before he went to Ringgold that this track was in bad condition. I

went there Saturday morning and filled that in as I went out with the motor car. I swear that.

Examined further by M. Neel:

That was Saturday morning.

[fol. 189] E. P. Campbell, sworn for the defendant, testified:

Direct examination:

I am not working for the W. and A. Railroad now. At the time this Coca Cola truck was struck up above Tunnel Hill, I was working for them then, I was just a laborer, section hand. I was on that Tunnel Hill section under Mr. Patterson. On the particular day he was struck, I was the track walker on that section, walked that day. On that morning, I went up with the section crew, to the tool house. I started from Tunnel Hill. I rode over this crossing that day on the motor car. I observed this crossing as I went over it. It appeared to be in good condition, it didn't look dangerous. At times before that, where the traffic knocked rocks out, I helped to rake the ballast back in the crossing, smooth it up, I helped on Saturday evening before Monday.

Cross-examination:

I don't remember just how long before this accident we tore up that track. I couldn't say, it has been so long now. I couldn't say it has been so long now. I don't remember whether I said how long it had been or not. I remember fixing the crossing, but don't remember keeping any date how long it was. I couldn't say just how long it had been since we tore up that track. It had been two weeks, but I couldn't say exactly the date, how long it had been. We fixed the crossing overhauled it, put ties in it. I say we overhauled the crossing, put the ties, ballast rock, back in it like we found it when we tore it up. We done it by main strength, I reckon and awkwardness, jacked it up with a jack. I don't know how high we jacked it, enough to get the ties under. I don't know whether we jacked it up a foot or [fol. 190] not. I didn't measure it. I didn't measure about

fixing the crossing, we just got it to where we could fix it. After we jacked it up they put the stakes there for us to level the track up to, surface stakes. I couldn't say as to the date, when they done that. I couldn't say how long before we jacked it up, not so certain of the date. I don't know just when it was. I couldn't tell you what it is that makes my memory faulty about those things. We didn't scratch out the dirt and rock, we dug out the dirt and rock, had to get the ties out, dug out all along there at the crossing, at the main line, dug to the bottom of the ties. I don't know how deep that is, I didn't measure it. Some ties are thicker than others. I don't know just exactly about the ordinary tie. If that dirt and rock was put back in, I guess. It was put back in, part of it as we used more, enough to fill it up with. I don't know how long it was before we put it back in, until we got it fixed. I don't remember how long it taken us, about a day, I guess. I couldn't say where the stakes were put in we were to elevate it to. We didn't try to fix it one day when it rained, we did. That was one day it rained, I couldn't tell you what day of the week it was now. I don't know how much higher that main line was when we finished there than it was before we began to raise it, I didn't raise it. I couldn't say exactly—six or eight inches. I told you it was raised some. We didn't raise the passing track at all, but we did raise the main line. That left it just like we raised it of course. We used ballast rock, left it just like the rock as you know. Things cross it, the loose crossing wouldn't be like one packed down, it would work out, the rock, in crossing there, wagons, automobiles, vehicles, I don't know whether it would throw them out, it would leave a place, of course, [fol. 191] not a bad place. It would leave a low place, and the more travel the more it would push them out in that condition. We tamped the rocks in as good as we could. We tamped them in with a tamping pick. We tamped all we could tamp on it of course. We got it done. This was just some loose on top, we could not fasten them on top. They would give way right on top. They did not have any screenings up there to put on it. Of course if anything is packed down, the better packed down, the better it would be. I wouldn't say how long after Henderson was hurt we screened it. I don't try to recollect. I know I did this

on Saturday, filled it up. I recollect what my job was about up there. The section men helped me to fill in there. I don't remember who helped me, we all come in and done the work, filled it in that evening, Saturday evening after dinner. It was not Saturday morning, it was Saturday evening. I am sure of that. I don't remember who helped me. Mr. Patterson was there. I don't remember whether he helped or not. I told you I don't remember now who it was; Olin Vester I believe it was. He is not here. I reckon not. I have not seen him today. I don't know who else helped, whether anybody or not, all of us fixed it, me and Vest. I am pretty sure Vest helped. I don't know how long it took to fix it. I didn't time it, I couldn't say about how long, just exactly. We just worked until we got it done. I don't know how long it took us to fix it, I wouldn't say, I wouldn't know how long to say. I can tell you what was the matter with it when we fixed it, me and Vest, some loose rock got pushed back and we filled it in, pushed back in the crossing. I told you we just put them back in there where the wagon knocked them up, filled them in like the man told us to do. It had not been in the condition long, we filled it up for a few days. I don't know about it getting bad, [fol. 192] we would pile them in whenever they needed it. You will have to ask the man that sent me over the track as to why I was walking it. I done told all I knowed, it just needed a few rocks and we put them in. We got them just along there wherever they were. We put rock unloaded in along there. We filled it full and when it pressed back, we put more. After we fixed it that Saturday, as I am swearing, I cannot tell why three or four cars stalled there on Saturday, if they stalled, it would be something wrong, wrong with the cars. They passed over it while we were working on it, they never stalled then. The worse fix it was the less stalling, according to my swear, it seems like it.

J. C. Wilson, sworn for the defendant testified:

Direct examination:

I live here in Dalton. I am a photographer. that is my regular business. I have been in that business twenty five or thirty years. A short while after this Coca Cola truck

was struck on the crossing, above Tunnel Hill, I went up there at the request of the railroad company and made some pictures. I later went back a second trip and made some more. These five pictures number 1, 2, 3, 4, 5, are the ones I made up there at the crossing. As to each of these pictures, they are fairly and correctly made, made just like you would see the track there looking at it, no way in the world to change it. It is a fair picture of it, fair representation. It looks exactly as you would see it. Picture Number One here, this picture was made about seventy-five feet from the track on the bank. I mean my camera was sitting on the bank. This road that turns to the right, that's the railroad there. [fol. 193] That road that turns to the right is w here a person coming from Tunnel Hill to Chattanooga would travel; from Dalton to Chattanooga. That road going straight on in that picture, I don't know where that road goes, I haven't been up it very far. Where the road goes out of the picture at the lower right hand corner, that road leads out to Dalton. The railroad track right is along here; going that way, towards the left of the picture, that's towards Chattanooga. Coming back this way, right of the picture is Tunnel Hill. That picture was made on the side of the bank of the road seventy-five feet from the crossing. Picture Number Two that was made down the track towards Tunnel Hill. My camera was sitting below the road, where the road crosses, coming up to the railroad up here. The camera was sitting right in the road when the picture was made. I approached close to the crossing, edge of the track right at the edge of the crossing when I made that picture. Picture Number Three, the one with the train in it. That was made about forty-five feet from the track, the camera was sitting in the middle of the road, this road that turns to the right there is towards Chattanooga. A person standing looking at the picture, as it goes back here would be back towards Tunnel Hill. My camera is pointing towards Chattanooga. That train in the picture is south, coming south. That picture fairly represents what a man would see standing in the dirt road, just exactly forty-five feet from the track. A man can see as much as that picture shows, he can see a little more, because he would be higher than the camera. I did not have my camera quite as high as a man would be in a truck. This picture number four, before I get to that—my

first trip up there was a day or two after the accident. This one here was taken after the accident, number four that has leaves on it. That was made a day or two after the acci- [fol. 194] dent, south of the crossing, working up towards Chattanooga, I mean looking up, Tunnel Hill back this way. A person going to Chattanooga on this, to the right of the picture, would go towards Chattanooga on that crossing, if they took the left that would be leading to the road going back to Tunnel Hill. The one on the left is the passing track, the one on the right the main line. Picture number five that was made about the same distance as number one, only the camera was in the middle of the road about seventy-five feet from the crossing. This road turns to the right going across the crossing, and then on straight ahead runs parallel with the track. This picture was taken about seventy-five feet from the crossing in the middle of the road. Number one was made about the same distance only I was on the west bank of the dirt road, up on the bank.

Cross-examination:

I made two trips up there. The first trip I made, as well as I remember, probably two or three days after the accident. Mr. Taylor got me to go, George Taylor, he is the lawyer for the road. He went with me, and I took some pictures of the crossing then. I don't know how many pictures I took then, I made, I think there is three I made the first trip, as well as I remember, I think it was three. The elevation on the first picture, the camera, when it was standing up, it was about this high to me, I reckon, about four and a half feet high when it is elevated. The camera was standing in this one, it was standing in the middle of the road. That is number three. The first picture, that was up on the bank, just across, on the left hand side of the road, on the bank. That bank is about two feet high I guess. I got upon the bank just to bring it across the [fol. 195] track. I made one there and one across the track. I did not have to elevate the camera to get the track, I just made it that way. I wanted to show the road across here and I could not see it down there. A man six feet high could see better than a man four, and the higher you elevate the man the better you can see, and the higher you

elevate the camera the better. I was right down the middle of the road when I made this number five. I was up above the culvert, up towards the crossing, towards the crossing. I did not take one down from the culvert. I was not employed to make one there. I was employed to make pictures of the crossing. I went up there with the intention of seeing what the physical ground was. Mr. Taylor did not ask me to take one at the lower place. I did not think that concerned it, I just made the crossing. I made what he told me to, and where he didn't tell me I left that unmade. He paid me for it. I don't remember how long after that I went back up there, probably two or three months seemed to me like. Mr. Taylor went with me then, George Taylor, took me up there again. The next time, made this one, next trip. That is number three, from the middle of the road, where the road turns up the track. He showed me where he wanted it made from, forty five feet from the track. Standing there, I don't know that there would be anythink that would prevent the engineer on that side seeing a man or truck approaching that down there. There would not be a thing. If he was on the engine coming there he would have seen the truck when it started up that embankment when it was down in the road and see it plain, unless something cut his view off. If he could see good he could see that. I don't know when number two was made whether the second trip or not. I reckon number two was made the second and number three. There was no snow on the ground when I took any of these pictures. That is white [fol. 196] rocks and dirt showing there. I would say that elevation there is about six or eight feet, about eight feet toward where the picture was taken, to the picture. I am guessing from the natural ground. I can get it in the picture. They do not show level. If it showed level that would show right there like that there. It is a smooth road right there. It does not show any mud holes. Outside of the time George Taylor and I went along there, I don't think I ever saw that road when there wasn't mud along there. I don't know how high the railroad track is above the dirt road along there by that embankment, the culvert I wouldn't say. I haven't any picture of the culvert. The dirt road is about six or eight feet below. I do not know it is fifteen feet. I don't know whether it is fifteen feet

anywhere along there, I never looked at it. I have passed it, I never looked at it to see how high it was, I never thought anything about the culvert. I did not look at the culvert, I looked where the accident occurred, I never paid any attention to the culvert. I have been over there a few times but didn't pay any attention to how high it was, never did.

H. C. Hull, sworn for the defendant, testified:

Direct examination:

I work for the N. C. and Saint L. Railroad, I am stationed at Nashville, Tennessee. I am in the mechanical department of the railroad, mechanical engineer, protographer. I do picture making for the railroad. I also keep the record of the sizes and dimensions of the cars and engines, et cetera. It is my business to personally make those measurements and check them. The height of an engine such as N. C. engine 384 the height is fourteen feet nine and a half inches, I compute that height by putting a level on it from the rail to the top of the extreme height, setting on the rail [fol. 197] to the top of the smoke stack is fourteen nine and a half inches. The length of a freight cab—run about thirth three feet, that is not the box itself only averages about thirty feet; between the ends and couplers it would take about thirty three feet. I made some pictures of this crossing above Tunnel Hill where the Coca Cola truck was struck. There four pictures you hand me, marked 6, 7, 8, and nine are the pictures I made there. These pictures are fairly made. They correctly represent what was in front of the camera at the point where they were taken. I have not made any effort in any way changed to make the pictures to make them warp what was shown there from what it truly is. This picture Number Six is taken about forty feet from the passing track, looking down the hill showing the recesses, showing the road, as you come from Tunnel Hill on up to the railroad and back here, leading up to the crossing and the other road going on towards Chattanooga. The road that goes right on up parallel with the track, that is the road shown in the extreme left of the

picture, that is, going up to the crossing. The road that runs straight on up with the track, that is the road on the extreme right of the picture. If you go the way the camera is looking and travel down that road, that would be toward Tunnel Hill, down this way. Down in the swag there is a small bridge. This point right there that is the fork of the roads just before the crossing. I judge the fork of that road is about forty feet from the crossing. Picture number seven here was taken with the camera facing towards Chattanooga, in other words this train is going towards Chattanooga. This is the front of the train up here this is the back end of the Dixie Flyer. The camera was sitting sixty five feet from the inner rail here, from the north bound inner rail on north bound track, or fifty five feet from the passing track—the track is practically eight feet three inches apart there—and the camera is facing towards Chat-[fol. 198] tanooga. In other words my back was towards Tunnel Hill when this picture was made. This road in the extreme left of the picture is the one that runs straight on away from Tunnel Hill if you don't turn over the crossing. This arrow here, that's the way a man would go to go across the crossing. That's the Dixie Flyer, it happened to come along as I was making the picture. These are pullman cars. There are six cars there with the baggage car, seven—seven, I said with the baggage car. The length of the Pullman cars are eighty five feet, eighty five feet. The baggage cars are about seventy eight feet long. On this specific engine, the length of the engine and tender would be about eighty six feet. My camera was sixty five feet from the main line to this. That is about four feet six inches from the ground, that I had the camera, and in the middle of the dirt road. Adding up the amount of the train showing there, including tender engine and seven coaches, that is in sight from that point, that is six hundred and eight feet, about. I did not measure the baggage car—seven hundred and eight feet. The track when it gets up there to where the engine is, it curves to the right the way the train is going. That's the rear end of the same train I taken on the other picture, number eight. The rear end there is about seven hundred and ninety two feet from where I was at, I mean, yes seven hundred and ninety two feet. That was the same position as the other picture. In

picture number nine, the camera was sitting in this picture, I reckon you would call it north of the crossing, towards Chattanooga, nine hundred and twenty nine feet from the crossing. This little white mark across the rail that is the crossing. I was facing back towards Tunnel Hill. Nine hundred and twenty nine feet from the crossing. Marked on the picture there is a little arrow, an auto, that was the [fol. 199] auto placed in the same position I was in when I taken the others, I mean the places where the train was. In other words, this auto was in the dirt road sixty five feet from the main line. I think it was a Chevrolet, I am not positive.

Cross-examination:

I live in Nashville, work for the road, I am the picture man for the road. I am the same man that made the pictures down here at the time of the Edwards case. I didn't say when I went down there to make these pictures. I went June 1st, 1926, this year. I stated the engine on that Dixie Flyer is about eighty two feet long. In the first place the engine on the Dixie Flyer was asked and second place the length of the engine 384 was asked. The length of the engine 384 is sixty six feet, ten and a half inches long. I have measured it. I have measured all of the engines we have got, practically. I measured all of the engines, and remember the length of all of them, practically. We have a diagram we make that takes care of that all the way thru. We measure these up to satisfy the lawyers, judges, and everybody else concerned, so we will know what they are. We do that with view of defending damage suits when killing folks, because we know we are going to be asked questions. We do not begin when anything like that happens that to defend law suit to satisfy the lawyers and judges; we go back and see if we are right and re-check ourselves, re-check ourselves always do that. I mean so we will know just exactly what we are swearing to, check it up to see. I don't know anything about Mr. Wilson. You will have to ask them that question, why they would want me to take pictures there rather than Mr. Wilson's pictures. I don't know. I don't know, I have been in trials here, not [fol. 200] in this case. I wasn't in this case. I have one picture there in which I undertake to show up the automo-

bile, and also have a picture here where I say it is sixty five feet away from the track. If, on that engine you had an engineer located there that had two good eyes there is no reason why he could not have seen that truck there, that same position. A camera, the further it gets away the more it spreads, yes sir. The vision of a lens is practically the same thing as a man's eye. If a man had two good eyes on that engine, looking down that track his eyes would have seen the road the same as you would see him. He certainly could see it. None of these pictures show how high this railroad track is from the dirt road. That is not my line of business, I am not a civil engineer, I am a mechanical engineer in the mechanical department. We do not have anything to do with civil engineering work. On a road approaching there, you get down in that hollow there, you are practically fifteen feet below the railroad, and that is very steep grade coming up there.

Miss Louise McCauley, sworn for the defendant, testified:

Direct examination:

I live a half mile northwest of the depot at Tunnel Hill. I have lived there all my life. I am about a hundred and fifty yards from the crossing where the Coca Cola truck was struck in which Mr. Henderson was killed. I live north, that is on the dirt road that leads from the crossing towards Chattanooga. I was at the south end of the house under a plum tree when the truck was struck. I was picking up plums. I was not looking towards the crossing. I didn't see it. I heard the train coming. I heard it do some blowing back before it got to the crossing some distance. I heard first a long blast, it was for the station, and [fol. 201] then it blowed two long blast and two short ones for the crossing, and then it commenced the distress signal in just a second. By distress I mean this, toot, toot, toot. That was just a second after the distress signal. I have lived there long enough to get familiar with the signals. The train stopped. I did not go down there. I first learned Mr. Henderson was killed about one o'clock. I

suppose it was this train that did the blowing. It was still standing there.

Cross-examination:

It was standing there at one o'clock, same train I heard blowing there at one o'clock. I heard it blowing between nine and ten o'clock in the morning going south, and it stood there until one o'clock, it was still standing there at one o'clock. I don't know how much longer it stood there. I did not watch it and see it. I was not down there at one o'clock. It is about one hundred and fifty yards from my house, right north of the railroad, on the Dixie Highway. The Dixie Flyer was held up at Tunnel Hill that morning, I suppose it was—It was delayed. It ought to pass my place about twelve o'clock. I couldn't tell you what time it did pass, I didn't pay any attention after I heard it blow at Tunnel Hill. I disremember how long it was. I suppose it was about one o'clock or two when the local took the siding. The local took the siding there at Tunnel Hill. I did not go down there. I know it on account of it taking the switch there, I suppose it took the siding. It is about a half mile from my place, I could see the switching down there, when it come down out of town, could see the crossing from my home. He switched back there about one o'clock or some time between one and two. It ran down to Tunnel [fol. 202] Hill to the depot and came back on the siding, come back west. It did not pass out beyond the crossing, it stood right on the crossing, backed back there. That truck was knocked off the track, it was on the south side. The Dixie Flyer passed about one and two o'clock. It blowed as it came out of town. It was a long blow. He didn't blow any more until he passed on. Just one long blow. That's all the blowing I paid attention to. It gave the station signal as it came out of Tunnel Hill. It blowed and I didn't pay any more attention to the train. I said it didn't blow but one long blast. I disremember the date when I heard that train blowing that I have been swearing about. I don't know the date. It has been two years this past summer, last summer. Nobody came to see me what I would swear about this, only Mr. Taylor come to my house this summer, the good looking gentleman sitting over there. He never did find me until this summer. He came there to

have a settlement about some burning of our timber, that burning was a year ago last year. I don't know how come him to be so long hunting me up, but it was just arranged that way. It hadn't been burnt quite a year when he come to settle. I did not charge him any interest because it was an open account and I could not charge him any interest. I claimed for the burning. He paid me one hundred dollars for the burning. He paid it in May. That was not after he found out I would swear for him, there was nothing mentioned about that. That was when he found out about it, but it was after the settlement. There was nothing mentioned until he settled with me. He did not know anything about what I knew. I told him unthoughted. I did not feel so towards George, after I got my money, I wanted to help him some. It was the very day he was there that I [fol. 203] recollected about this and told him about it. It wasn't five minutes after he paid me the money that it refreshed my recollection and I told George about it. I had not said a word to anybody about it up to that time I kept it to myself, and about five minutes after I got the hundred dollars I belched up what I told this jury, that is right. George was at my house in May, it was twelve o'clock. I did not give him dinner. I don't know whether he ate dinner or not. I did not ask him to dinner. He come there in a car to my house. I sent him a claim, sent it by my brother who lives in Atlanta. The claim had never been made out, the foreman sent in the claim, Alvin Patterson was the foreman. I don't know how much he sent it in for. I don't know how he knew to send my claim in, no sir. The foreman sent the claim because it was interest. I don't know what it was. It wasn't handled until after the estate was settled intestate. George did not bring the money out there, he didn't bring any money, he wrote out a check afterwards. We just simply had a conversation, George Taylor and I, I didn't tell him anything only about the man being killed there, right there close to us, we saw it afterwards. I saw it down there. My sisiter saw it that's who. I didn't see the train hit him, but I heard the racket. I didn't tell George I saw it. We didn't see it. I can't remember what all George said I said. I don't remember. I said to him, I heard the train blow there and I said I could have saw it if I had straightened up. That's

what I swear now. I don't remember just what George did say. I told you I disremembered it, I can't tell you. I heard the train coming, and when it come around it give one long blast. That was just the local train and then it blowed for the crossing, two long blast and two short, that was for the crossing, and then it commenced that distress signal [fol. 204] right immediately. I am sure of that. He gave the signal one long blast and then he gave two long and two short.. They were right together, and then immediately gave the alarm signal. I am sure of that. I never mentioned that until I talked to George.

Redirect examination:

With reference to the delay in this fire claim, that was a claim in favor of an estate. It was an estate in litigation sometime after the fire. That held up the settlement. I have no interest in this case in any way at all.

Recross-examination:

I was not administrator of the estate, wasn't no administrator appointed, never has been, none yet, it is in our possession now.

A. G. Patterson, sworn for the defendant, testified:

Direct examination:

This truck was not pulled off the passing track that day, it was on the passing track; I moved it off that day. I took the work train and pulled it up and then took a jack and jacked it off. The work train was there about one o'clock doing that, as well as I remember.

Cross-examination:

The train that killed Henderson, I don't know how long it stood there. I know it went on. I got there about one o'clock, it was gone then.

HOMER BRIDGES, sworn for the plaintiff, testified:

Direct examination:

I live about a mile and a half from Rocky Face. I [fol. 205] let Mr. McCollum have some fruit trees or pruned some fruit trees for him a short time after this occurrence. I seen him at home and then I seen him on the street a couple of times. He discussed this killing up there with me. We were talking to him about this accident that occurred up there, about Mr. Henderson getting killed, "Well" he says, "I would not have killed Mr. Henderson for anything if I hadn't thought he was going to get off the track." He said he had plenty of time to get off, "I had plenty of time to stop, I wouldn't have killed him for anything in the world if I thought he wasn't going to get off the track."

Cross-examination:

I didn't tell it to any one except Colonel Mann. I never told it to a living soul on earth until I told Colonel Mann, not that I remember, no sir. I was up in the office one day to give Gordon some accounts I had out, to do a little collecting on them, and Colonel Mann asked me if I traveled around Tunnel Hill selling nursery stock, and he asked me if I used this crossing, and I said I did sometimes, it had been some time, he asked me about the condition of the crossing, I told him I didn't know, I didn't know at the time Colonel Mann was talking to me he was representing Mrs. Henderson in this case. The subject got up and I told him what Mr. McCollum said. I don't know how come me to voluntarily tell him what was said. I cannot tell this jury why I voluntarily told that. The subject just come up and I told what Mr. McCollum told me. I don't know how long I have known John McCollum. I am acquainted with his general character. It is good as far as I know. From my knowledge of his character, I would not believe him on oath, not since he denied this statement. I would not. Be- [fol. 206] fore he denied this statement I would have believed him on oath, yes sir. He denied the statement to me. If he had not denied it I suppose I would.

Redirect examination:

I have no interest in this case whatever, Colonel.

Intervenor, Maryland Casualty Company offered and there was admitted in evidence the agreement entered into between the Coca Cola Bottling Company and the plaintiff, together with the award of the Industrial Commission of Georgia based upon such agreement, the material portions of said agreement and award being as follows:

This agreement entered into the 18th day of September, 1924, between the Coca Cola Bottling Company of Dalton, Georgia, the employer, and Mary Elizabeth Henderson, of Dalton, the window of and principal dependent of J. C. Henderson, deceased, and employee of the Coca Cola Bottling Company, wherein they agreed: that J. C. Henderson, the deceased employee was killed while in the course of his employment with the Coca Cola Bottling Company, by a train of the N. C. & St. L. Railroad at Tunnel Hill, Georgia, while driving a truck for his employer in the course of his employment, and that the employee's average weekly wages was $30.00.

The award of the Industrial Commission of Georgia made on October 4th, 1924, in the case of J. C. Henderson, deceased, Coca Cola Bottling Company, of Dalton, Georgia, employer, and Mrs. Mary E. Henderson, wife of the deceased employee, claimant, and the Maryland Casualty Company, of Atlanta, Georgia, Insurer, wherein the Industrial Commission made an award under the agreement of September 18th, 1924, made between the Coca Cola Bot-
[fol. 207] tling Company and Mrs. Mary E. Henderson, awarding under the provisions of the Georgia Compensation act, that the Coca Cola Company, the employer or the Maryland Casualty Company, the Insurer, pay to Mrs. Mary E. Henderson, compensation at the rate of twelve dollars and seventy-five cents per week for three hundred weeks and one hundred dollars for burial expenses.

Defendant offered, and there was admitted in evidence, photographs Nos. 6, 7, 8 and 9, taken and testified about by

the witness, H. C. Hill, a copy of said photographs, numbered as aforesaid, being next hereto attached, as follows:

(Here follow photographs Nos. 6, 7, 8, and 9, marked side folio pages 208, 209, 210, and 211)

[fol. 212] Defendant offered and there was submitted in evidence photographs Nos. 1, 2, 3, 4, and 5, taken and testified about by the witness, J. C. Wilson.

Copy of said photographs, numbered as stated, are next hereto attached as follows:

(Here follow photographs, marked side folio pages 213, 214, 215, 216, and 217)

[fol. 218] In Superior Court of Whitfield County

[Title omitted]

Order Filing Brief of Evidence

The foregoing pages constituting a brief of the evidence in the above stated case is hereby approved as a true and correct brief of the evidence adduced upon the trial of the above stated case, at this the October Term, 1926, of said court.

Let the same be filed as a part of the record herein.

This December 11, 1926.

M. C. Tarver, J. S. C. C. C.

[File endorsement omitted.]

[fol. 219] In Superior Court of Whitfield County

[Title omitted]

Charge of the Court—Filed Dec. 11, 1926

Delivered by His Honor Judge M. C. Tarver, at October Term, 1926, Whitfield Superior Court.

Gentlemen of the Jury: This suit was brought to the October Term, 1924, this court, and sounds upon the docket,

FEB 1926

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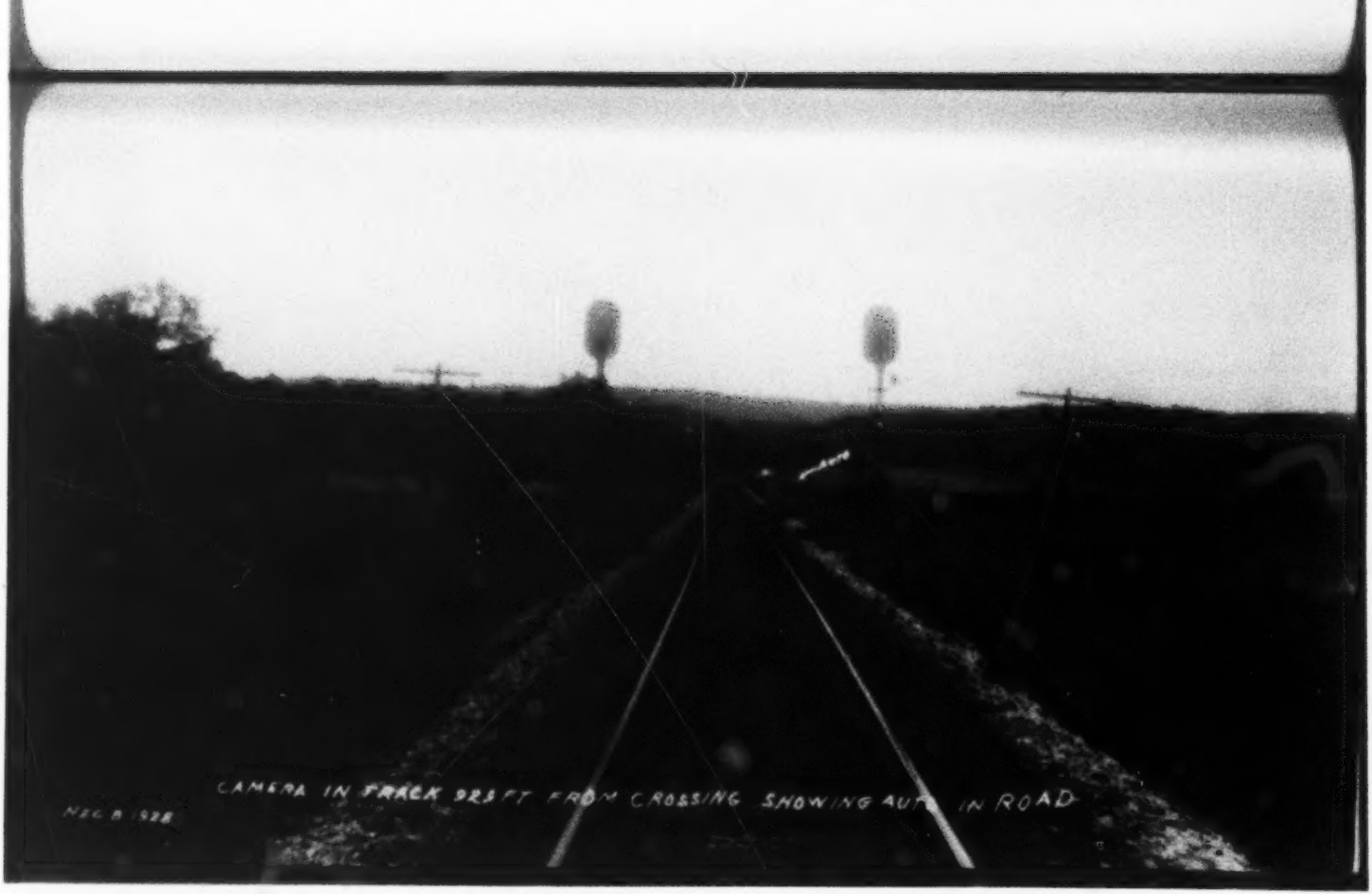
CAMERA IN TRACK 925 FT FROM CROSSING SHOWING AUTO IN ROAD
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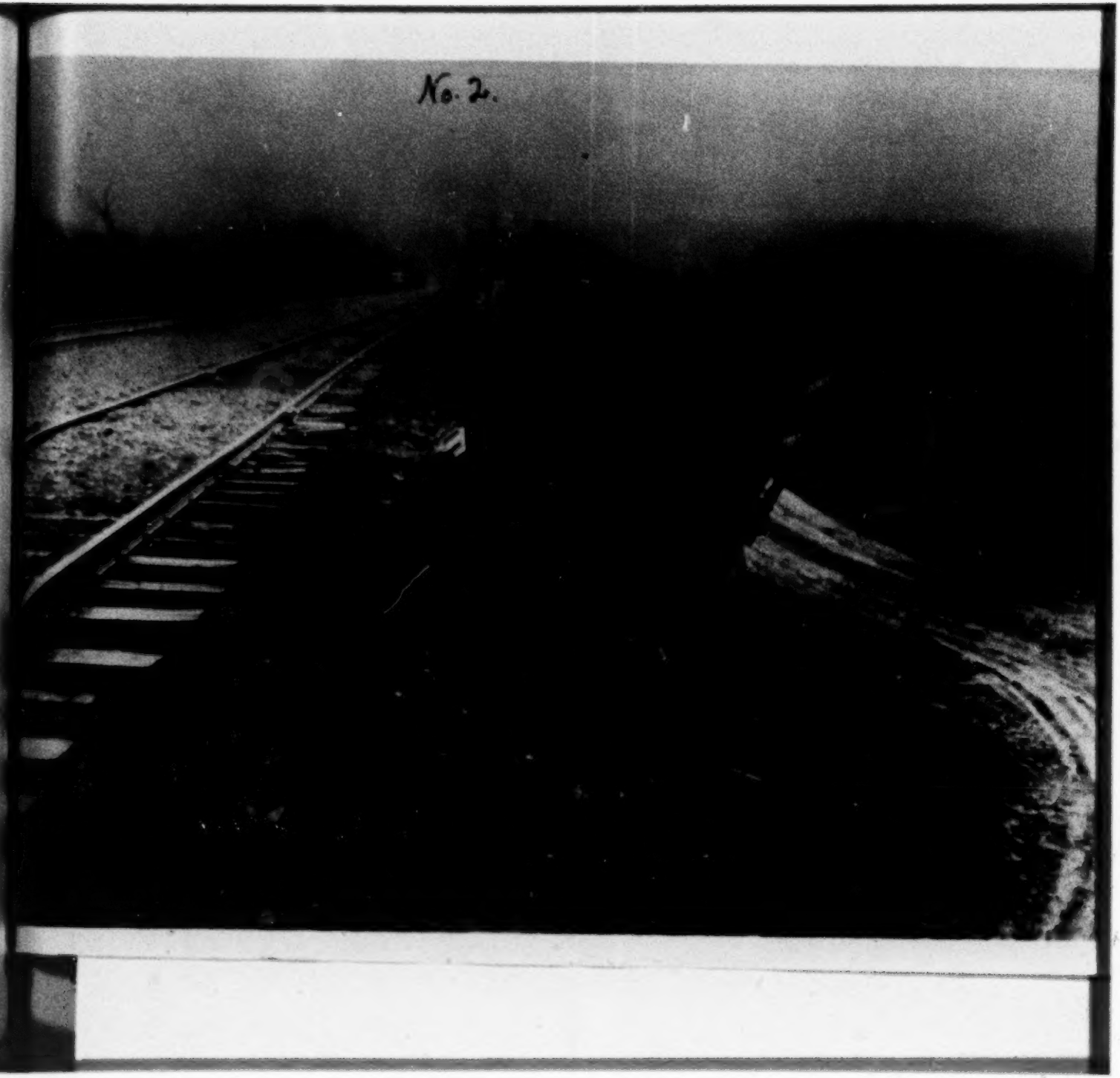
No 1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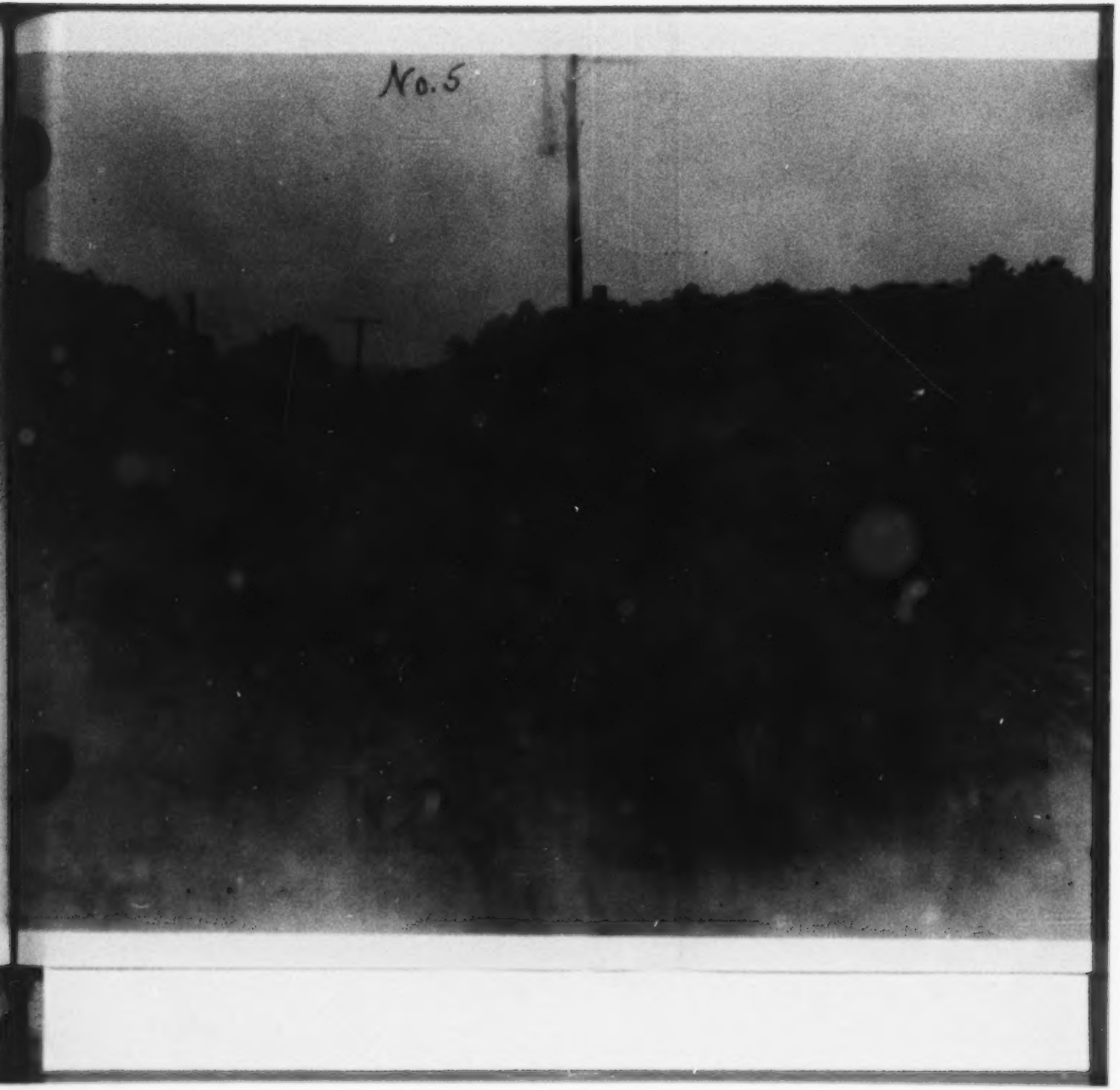
No.5

Mrs. Mary E. Henderson against the Western Atlantic Railroad, being a complaint for damages because of the alleged negligent homicide of the husband of the plaintiff.

The contentions of the parties are set out in the pleadings which you will have out with you when you retire to consider the case, and to which you may refer as often as you think it necessary or proper in order to ascertain exactly what those contentions are.

The pleadings are not evidence in the case except in so far as the answer of the defendant may admit some allegations of the plaintiff's petition; to that extent they are evidence, but beyond that they are not.

In brief, the plaintiff contends that she was, at the time of his death, the wife of J. C. Henderson, and that on the fourth day of August, 1924, her husband was operating [fol. 220] an automobile truck from Dalton to Ringgold, at a point beyond the town of Tunnel, and along the highway paralleling the line of railroad of the defendant at that point, and that he approached and went upon the crossing where the homicide is alleged to have occurred, being the third crossing above the depot at Tunnel Hill. He says that from this crossing the ballast and rock between the rails and ties had been removed by the employees of the defendant, leaving the crossing in a dangerous condition, as she insists, in that the rails and the ties were exposed for a distance of six or eight inches. She says that, as her husband drove the automobile truck in question on the crossing, the truck mounted the first line of rails but sank into the opening between the ties, caused by the removal of the ballast, and on account of the removal of the ballast, and the condition of the crossing, that the engine of the truck was killed, and the truck was stopped at this point. She says that as it was so located upon the crossing a train of the defendant struck the truck and caused the death of her husband. She says that this train had approached from the north, and that the engineer of the defendant, in charge of its locomotive drawing this train, had not signaled the approach of the train to the crossing. She further says that he had failed to keep a constant and vigilant lookout in order to ascertain whether or not any person or property was upon the crossing at that time and that his eyes were defective. She further says, that, after having ascertained

the presence of her husband on the crossing and his position of danger, he did not check nor endeavor to stop the train so as to avoid striking her husband. She assigns these various acts and ommissions, as specified in her petition, as negligence on the part of the defendant railroad, [fol. 221] and she says this negligence resulted in the death of her husband, and has injured and damaged her in the sum of fifty thousand dollars, for which she asks a verdict at your hands.

The defendant, replying to these allegations on the part of the plaintiff, admits that her husband was stricken and was killed on the occasion in question, but it denies that his death was the fault of it or its employees. It insists that his death was the result of his own lack of ordinary care for his own safety; says that he had exercised his sense of sight and of hearing at the time he went upon this crossing, he would have ascertained the approach of the defendant's train and would not have been killed. It says that its employees, in charge of its locomotive and train of cars, were in the exercise of ordinary care and diligence; that the engineer's eyesight was not defective; that the signals, required by law to be given of the approach of the train to the crossing, were given by the engineer; that he kept constant and vigilant lookout in approaching the crossing; that plaintiff's husband drove the truck upon the crossing only a short distance in front of the approaching engine, and it was a matter of impossibility for the engine to have been stopped by the engineer in order to have avoided striking him. It insists its crossing was in good repair and in a reasonably safe condition for use of those who used it with ordinary care. It says, even if its employees had been negligent, as insisted upon by the plaintiff, that the plaintiff's husband by the exercise of ordinary care for his own safety, could have avoided the consequences to himself of such negligence, although it denies that such negligence in fact existed.

I have not undertaken to state the contentions of the parties with absolute faithfulness to detail. As already [fol. 222] stated, you will gather those contentions from reading the pleadings after you have retired to consider the case.

I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for recovery of damages by reason of such injury, would be entitled to recover.

I charge you that the law requires that one about to cross a railroad track, on a highway crossing there over, must use his sense of sight and hearing in the way that an ordinarily prudent person would, under similar circumstances, use his sense of sight and hearing, in order to determine whether it would be safe to cross such railroad track at that time and place; and this is true notwithstanding the railroad company may be by law required to give signals of the approach of its trains to crossings, or to do such other acts as would, if faithfully performed, render improbably, if not impossible, injury to any one crossing such track.

If you should find from the evidence that defendant's employees were negligent in any of the particulars alleged in plaintiff's petition, and that such negligence was existing at the time that plaintiff's husband was killed, still plaintiff could not recover any damages if deceased, in the exercise [fol. 223] of that degree of care and caution which an ordinarily prudent person would exercise under similar circumstances, could have discovered the defendant's negligence, and when discovered, could by the exercise of a like degree of care have avoided the same.

If, at the time of the alleged injury, an ordinarily prudent person, under similar circumstances, to those then surrounding deceased, would, in the exercise of that degree of care and caution which such person generally uses, have reasonably apprehended that the defendant might be negligent at the time when and where the injury occurred, and, so approaching the probalility of the existence of such negligence, could and would have taken sufficient steps to

prevent or avoid the injury, then plaintiff cannot recover if deceased failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether such negligence of the defendant, which might have been reasonably apprehended really existed.

I charge you, however, that the duty to exercise ordinary care, to avoid the consequences of another's negligence, does not arise until such negligence shall have become apparent, or in the exercise of ordinary care ought to have been anticipated or discovered.

If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained, and, if he fails to do this, and is injured, no recovery will be allowed, if by taking proper precautions he could have avoided the consequences [fol. 224] of the negligence of the person inflicting the injury.

I charge you that both the railroad company and a traveler upon the highway have the right to pass over a railroad crossing, and neither has a right to interfere with a proper use of it by the other, but, owing to the momentum of trains, the confinement of their movement to a track and the necessities and public nature of railroad traffic, the railroad company has the right of way, and the traveler must wait until the imminently approaching train, the coming of which he knows, has passed.

The right of passage is in the railway company.

I charge you further, at the time this accident occurred any person driving an automobile was required by law, on approaching a railroad crossing, to at all times have said automobile under immediate control. If you believe that the deceased in this case, when approaching this railroad crossing, did not have his automobile under immediate control, that would be negligence per se, and if that negligence was the proximate cause of the injury sued for, the plaintiff would not be entitled to recover in this case.

I charge you that ordinary care is the degree of care which every ordinary prudent person would exercise under similar circumstances.

The same degree of care was required of the plaintiff's husband, on the occasion under investigation, and of the engineer of the defendant in charge of its locomotive, and a like degree of care was required of the employees of the defendant who were charged with the duty of maintaining its crossing at the point where the plaintiff's husband is alaleged to have been killed.

I charge you that the duty rested upon the railroad company to maintain its crossing in a reasonably safe condition [fol. 225] for those who used it in the exercise of ordinary care, and a failure to discharge this duty would constitute negligence on the part of the railroad company; and if such negligence existed, and if such negligence was the proximate cause of the death of the plaintiff's husband, she would be entitled to recover, unless by the exercise of ordinary care he, the husband, could have avoided the consequences to himself of such negligence.

I charge you if, when the plaintiff's husband approached the crossing in question, he found his view of the railroad track, and of the crossing, and of any train that might be approaching thereto, obliterated at the time by obstruction, the law required of him the degree of care commensurate with the danger of the situation, and such degree of care as an ordinarily prudent person would have exercised under such circumstances. If he failed to exercise that degree of care, and if his failure so to do resulted in his death, the plaintiff is not entitled to recover.

I give you in charge section 2677 (b) of the code of this State: Upon the line of each railway in this State, and at a point four hundred yards from the center of its intersection at grade with any public road or street used by the public generally in crossing the tracks of said railway, and on each side of said crossing, there shall be erected by the railroad company, persons or corporations owning and operating said railway, a blow-post to indicate the direction of such crossing, and the engineer operating the locomotive engine of any railroad train moving over the track of said railroad shall be and he is hereby required, when he reaches the said blow post, as a signal of approach to

said crossing, to blow through said whistle two long and [fol. 226] two short blasts at intervals of five seconds each blast; said blasts to be loud and distinct. In addition thereto, after reaching the blow-post furtherest removed from said crossing, and while approaching said crossing, he shall keep and maintain a constant and vigilant lookout along the track ahead of said engine, and shall otherwise exercise due care in approaching said crossing, in order to avoid injury to any person or property which may be on such crossing, or upon the line of said railway at any point within fifty feet of such crossing.

At the time of the alleged injury complained of by plaintiff no law of this State imposed upon a railroad engineer an absolute duty to have his engine under such control, when approaching a highway crossing, as to be able to bring it to a stop in order to avoid injury to any person at such crossing. No such absolute duty is imposed on such engineer by the code section just read, to the effect such railroad engineer shall otherwise exercise due care in approaching such crossing, in order to avoid doing injury to any person or property which may be on such crossing.

I charge you that due care, as referred to in the section of the code just read in your hearing, has reference to ordinary care. Whatever ordinary care required in the operation of his engine, that, the engineer should have done.

I charge you, if, at the time of the alleged homicide, the engineer in charge of the locomotive of the defendant railroad was guilty of a violation of either of the provisions of the section of the code which has just been read in your hearing, and such violation is charged in the plaintiff's petition, and you further find that the injury or death of the plaintiff's husband resulted by reason of a violation of the section of the code just read in your hearing, as may [fol. 227] have been specified in the plaintiff's petition, and you further find that the plaintiff's husband could not have by the exercise of ordinary care for his own safety avoided the consequences to himself of such negligent act on the part of the defendant company's engineer, then the plaintiff in this case would be entitled to recover.

In other words, gentlemen of the jury, before finding for plaintiff, you must find from the evidence that one or more of the acts or omissions, which are in the petition of the

plaintiff alleged as negligence, occurred; that such act or omission was a negligent act or omission, that it resulted in the death of the plaintiff's husband, and that he could not have, by the exercise of ordinary care for his own safety, avoided the consequences to himself of such negligence. Irrespective of what the negligence of the defendant company may have been, if the deceased, by the exercise of ordinary care for his own safety, could have avoided the consequences to himself of such negligence, there can be no recovery. Nor, as already stated, could there be any recovery in the event his death was occasioned by his own negligence.

If the defendant has shown that it and its employees exercised ordinary care and diligence in the particulars wherein negligence is alleged, the plaintiff cannot recover.

In the event the plaintiff is entitled to recover she will be entitled to recover the full value of the life of the deceased, unless you decide to diminish her recovery in accordance with rules which I shall hereafter give you in charge.

In arriving at what was the full value of the life of the deceased, in the event you should decide the plaintiff is [fol. 228] entitled to recover, you will proceed in accordance with certain rules which I shall now give you in charge. In the event you decide she is not entitled to recover, of course these rules should be disregarded. The fact that the court gives them to you in charge is not an intimation on his part that he thinks the plaintiff is or is not entitled to recover; that is a question entirely for your determination.

There has been introduced in evidence what is known as the Carlisle Mortality Table, set out on page 845 of the 70th Georgia Report, which you will have out with you. You should be careful, in considering this table, not to read any other portion of the report, nor any of the decisions which are set out herein, but should confine your consideration solely to the Mortality Table as set out on that page. You are not required to use this table, but you may do so if you should see proper. It will be your duty, if you find that the plaintiff is entitled to recover, to ascertain, as best you can from the evidence, first, what was the expectancy of the deceased in years at the time of his death. If, in arriv-

ing at that expectancy, you use this table, you will look under the head "Age" until you find the figures denoting the age of the plaintiff's husband at the time of his death as you may have ascertained it to have been from the evidence, and opposite these figures, on the right, under the head "Expectancy Years," you will find the figures denoting the expectancy of the plaintiff's husband in years at the time of his death, according to the computation of this table. In arriving at his expectancy, if you use this table, and find she is entitled to recover, you should take into consideration the fact that the computations of this table are based upon a human being of average health and vitality, and you will determine from the evidence whether or not [fol. 229] the plaintiff's husband is shown to have been such an average person.

After having ascertained from the evidence the number of years of the expectancy of the plaintiff's husband, if he had not been killed, you will go further and determine what would have been his average annual earning capacity for the period of his expectancy had his death not occurred. In arriving at that average annual earning capacity, you will take into consideration the probability or improbability of his having been at all times able to secure employment, and also the possibility or probability of sickness, as interfering with his earning capacity, feebleness incident to approaching age, and other things which, as men of reason and common sense, you know would have affected his capacity to labor and earn money.

After having arrived at his average annual earning capacity for the period of his expectancy, if he had not been killed, you will multiply this average annual earning capacity by the number of years of his expectancy, and this gross sum, in consideration of the fact that if you give the plaintiff a verdict it would be paid as of this date and not paid throughout the years of the expectancy of the deceased as it would have been earned had he lived, you would reduce to its present cash value, using as a basis for your computation the legal rate of interest, which is seven per cent.

I charge you that if the plaintiff's husband and the agents of the defendant were both at fault, the plaintiff may, nevertheless, recover, but the damages should be diminished by

the jury in proportion to the amount of default attributable to the deceased. I charge you further in this connection, that if the plaintiff's husband, by the exercise of ordinary [fol. 230] care, could have avoided the consequences to himself caused by the defendant's negligence, the plaintiff cannot recover, nor can she recover any damages unless the amount of default attributable to the deceased is less than the amount of default attributable to the employees of the defendant.

The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualification already given you, that, when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition, and the burden thereupon shifts to the defendant company to show that its employees exercised ordinary care and diligence in such particulars.

What is meant by the preponderance of the evidence is that superior weight of the evidence upon the issue involved, which, while not sufficient to wholly free the mind from a reasonable doubt, is yet sufficient to incline the mind of a reasonable and impartial person to one side of the issue rather than the other.

In determining what weight you will attach to the testimony of any witness, you may look at his or her appearance on the stand, take into consideration their manner of testifying, their interest or want of interest in the case, their feeling, prejudice or bias, if anything of the sort has been made to appear, together with their opportunity of knowing the facts about which they testify, and their inducement, if any, to swear falsely.

One witness has testified by deposition. You will consider her evidence in accordance with the same rules just [fol. 231] given you in charge except that she, not having been before you, you could not, of course, consider her manner on the stand.

You may also consider the number of witnesses who have testified for each side, or as to the truth of the contentions of each side, while the preponderance of the evidence is not necessarily affected by the number of witnesses. In other

words, the preponderance is not necessarily with the greater number of witnesses.

There has been filed in this case an intervention by the Maryland Casualty Company, an insurance corporation, which insists that, at the time of the death of the deceased, he was an employee of the Coca Cola Bottling Works of Dalton, Georgia, and that the Coca Cola Bottling Works had a contract of insurance with the intervenor, the Maryland Casualty Company, by which the intervenor had agreed to pay its employees, and their dependents, such amounts as the Coca Cola Bottling Works might have been liable for under what is known as the Georgia Workmen's Compensation Act, and the intervenor says that the deceased, having been killed in the course of his employment, was entitled to recover from the Coca Cola Bottling Works, and from it by reason of the contract of insurance, to which I have made reference, that is, that his wife was entitled to recover a certain amount, and did recover a certain amount. The intervenor says that by reason of a contract executed in settlement of her claim, and approved by the industrial commission, it became liable to pay to her one hundred dollars for the burial expenses of her husband, and twelve dollars and seventy five cents a week for a period of three hundred weeks, aggregating, together with the one hundred dollars burial expenses, thirty nine hundred and some odd dollars, and that it has already paid some fifteen hundred [fol. 232] and fifty three dollars, or other approximate sum, as may be shown by its intervention, and that it is liable to pay and must pay in future the remainder. It says that it is entitled to be subrogated by reason of these facts to any recovery which the plaintiff may secure against the defendant to the amount which it has paid and for which it has become liable.

I charge you that there is no dispute, under the evidence, with reference to the facts alleged in the intervention. Therefore, as a matter of law, the intervenor will be subrogated to the rights of the plaintiff in this action, in the event she should recover anything from the defendant railroad, to the extent of such amount as it may have paid or become liable to pay by reason of its contract of insurance with the Coca Cola Bottling Works, to which I have heretofore referred. This fact should not affect your

verdict one way or the other. You will add to your verdict, in the event you should find one in favor of the plaintiff for any amount, the words "and we further find in favor of the intervenor, Maryland Casualty Company," which would mean that the amount of recovery in favor of the plaintiff would be subject to the claim of the Maryland Casualty Company to the extent of such amounts as it may have paid, or may hereafter pay, on account of its said contract of insurance.

In giving you in charge these rules of law relative to this intervention, the court does not intend to intimate that you should find or should not find in favor of the plaintiff.

In the event you find in favor of the defendant, the intervention and the contentions set out therein, should be by you disregarded.

The form of the verdict will be as you may find the [fol. 233] facts:

Either:

We, the jury, find for the plaintiff so many dollars, and we further find in favor of the intervenor, Maryland Casualty Company,

Or:

We, the jury, find for the defendant.

In the event your verdict should be in favor of the plaintiff for any amount, it should be fair and just and not oppressive.

The foregoing charge of the court approved, as correctly setting out what the court charged the jury on the trial of the case; let the same be filed and become a part of the record in said case.

In open court, Oct. Term, 1926.

This Dec. 11th, 1926.

M. C. Tarver, J. S. C. C. C.

[File endorsement omitted.]

[fols. 234 & 235] Clerk's certificates to foregoing transcript omitted in printing.

[fol. 236] IN COURT OF APPEALS OF GEORGIA

17921

WESTERN & ATLANTIC RAILROAD

v.

HENDERSON et al.

By the Court:

The verdict was authorized by the evidence, and none of the grounds of the amendment to the motion for a new trial require another hearing of the case.

OPINION

BROYLES, C. J.:

This is the second appearance of this case before this court. The pleadings and the evidence were substantially identical upon both trials, except that upon the trial now under review the plaintiff amended her petition by alleging an additional act of negligence on the part of the railroad company, to wit, the running of its engine and trains by a nearsighted and practically blind engineer. As to this alleged act of negligence both the plaintiff and the defendant introduced evidence, and the issue of fact thus raised was decided by the jury. Under the facts stated above, the previous ruling of this court that the plaintiff was entitled to a recovery (35 Ga. App. 353) has become the law of the case, and that ruling must be and is adhered to.

However, it is contended by the plaintiff in error that the verdict ($15,000) was excessive. The evidence showed that the plaintiff's husband at the time he was killed by the running of the defendant's train was a little over 38 years of age; that he was earning $130 a month, and in addition was getting his house rent free, which was worth from $25 to $35 a month; that he was industrious, hard working, in good health, and seldom ill. In view of these and other facts disclosed by the record this court can not [fol. 237] hold as a matter of law that the amount of the verdict was so great as to show bias and prejudice on the part of the jury. Nor can this court hold as a matter of law (as contended by counsel for the plaintiff in error) that the evidence adduced demanded a finding by the jury,

under the doctrine of comparative negligence (which reduces the amount of a plaintiff's recovery in proportion to the amount of default or negligence attributable to him), that the amount of default attributable to the plaintiff's husband was not less than 49 per cent of the aggregate default attributable to him and to the employees of the defendant in the occurrence of the collision which caused his death, and that the amount of the verdict should have been reduced accordingly.

The charge complained of in the 14th special ground of the motion for a new trial was given and excepted to in the first trial of this case and was approved by this Court on the first appearance of the case before it (see 35 Ga. App. 353), and that ruling has become the law of the case. Special ground 18 of the motion for a new trial attempts to raise a constitutional question. The ground alleges that an excerpt from the charge of the court, based upon and construing section 2780 of the Civil Code of 1910, was in violation of the fourteenth amendment of the Constitution of the United States. The ground alleges also that if the code section can properly be construed as it was construed in the charge excepted to, then the section itself is violative of the fourteenth amendment of the Constitution of the United States. The code section in question has uniformly and repeatedly been construed by this court and the Supreme Court exactly as it was construed by the trial judge in this case, and this is admitted in the brief of counsel for [fol. 238] the plaintiff in error, who also contend in their brief that the statute itself (code section 2780) is in violation of the fourteenth amendment to the Constitution of the United States. In view of these circumstances it is obvious that the statute itself is the primary object of attack in this ground of the motion for a new trial, and such an attack can not properly be made in a motion for a new trial. A constitutional question can not be raised for the first time in a motion for a new trial. Ga. & Fla. Ry. v. Newton, 140 Ga. 463 (3); Hendry v. State, 147 Ga. 260 (8); McClelland v. State, 27 Ga. App. 783 (1).

The remaining grounds of the motion for a new trial (all of which complain of refusals to charge as requested, or of errors, either of omission or commission, in the charge of the court) show no reversible errors.

The request of the defendant in error, that damages for bringing up the case for delay be awarded her, is denied.

Judgment affirmed. Luke and Bloodworth, JJ., concur.

[fol. 239] In Court of Appeals of Georgia

Atlanta, April 13, 1927.

The Honorable Court of Appeals met pursuant to adjournment.

The following judgment was rendered:

Judgment

Western & Atlantic Railroad

v.

M. E. Henderson et al.

This case came before this court upon a writ of error from the Superior Court of Whitfield County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Broyles, Luke, and Bloodworth, JJ., concur.

[fols. 240-242] Clerk's certificates to foregoing transcript omitted in printing.

In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed Oct. 29, 1928

Comes now the Western & Atlantic Railroad, the appellant in the above styled cause, conformably to Section 9 of Rule 13 of this honorable Court, and adopts its assignment of errors as its statement of the points to be relied upon.

And the Western & Atlantic Railroad, appellant, further states that to a proper appreciation and decision of the questions presented by its assignment of errors it is essen-

tial to print the entire record as filed in this cause in this Court.

1. Print this statement.

Western & Atlantic Railroad, Appellant, by Tye, Thompson & Tye, Fitzgerald Hall, Attorneys.

October 5th, 1928.

We acknowledge service service of the above, copy of the same and copy of the assignment of errors having been delivered to us in person, this October, 1928.

[fol. 244] Georgia,
Fulton County:

Personally appeared before me John L. Tye, Jr., who being sworn deposeth that he is a member of the law firm of Tye, Thomson & Tye, Division Counsel for the Western & Atlantic Railroad in the State of Georgia, and that as such on refusal to accept service he served on October 6th, 1928 an exact copy of foregoing and attached paper designated "Statement of Points to be Relied upon, and Designation of the parts of the Record to Be Printed" together with a true copy of the assignments of error filed with the Clerk of the Supreme Court of Georgia October 5th, 1928, on William E. Mann personally, attorney of record for Mrs. Mary E. Henderson, appellee, and also on October 6th, 1928 served an exact copy of same papers on J. A. McFarland personally, attorney of record for Maryland Casualty Company, appellee.

John L. Tye, Jr.

Sworn to and subscribed before me October 8th, 1928. Roy M. Brown, Notary Public, Georgia, State at Large. (Seal of Roy M. Brown, Notary Public, Georgia, State at Large.)

[File endorsement omitted.]

Endorsed on cover: File No. 33,828. Georgia Supreme Court. Term No. 519. Western & Atlantic Railroad, appellant, vs. Mrs. Mary E. Henderson and Maryland Casualty Company. Filed October 29th, 1928. File No. 33,828.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

WESTERN & ATLANTIC RAILROAD,
APPELLANT,

Versus

MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY,
APPELLEES.

No. 519.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA.

STATEMENT BY THE WESTERN & ATLANTIC RAILROAD TO COMPLY WITH RULE TWELVE OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE HONORABLE COURT:

This suit was instituted by Mrs. Mary E. Henderson to recover damages for the death of her husband who was killed when a truck he was driv-

ing collided with one of the Railway's trains on a public crossing in the State of Georgia. (R., 62, 115, 127.)* The Maryland Casualty Company intervened. (R., 70-73.)

At the trial the judge charged the jury the substance of Section 2780 of the Civil Code of Georgia in accordance with its interpretation as construed by the appellate courts of Georgia. (R., 222.)

This charge and the statute itself were attacked by the Railway's eighteenth ground of its motion for a new trial on the ground of repugnancy to the federal constitution. (R., 105-107.) There was a verdict and judgment in favor of the plaintiff and the Maryland Casualty Co. (R., 78.)

The Court of Appeals of Georgia by a decision rendered April 13, 1927 (R., 239) declined to pass on the constitutional question on the theory that it had not been properly raised. (R., 236, 238.)

The Supreme Court of Georgia, the highest court in the State, granted a writ of certiorari on July 6, 1927 *for the sole purpose of considering said constitutional question.* (R., 31, 46.) It was so considered and, in an opinion filed September 15, 1928, the court expressly passed on the constitutional question as raised by the Railway, holding

*Record references in this brief of necessity refer to the original record as filed in this court and are brought forward in the printed record by side paging.

said state statute under attack to be valid and enforcing it against the Railway. (R., 32, 46-53.)

Final judgment was entered against the Western & Atlantic Railroad on September 15, 1928. (R., 54.)

The Chief Justice of the Supreme Court of Georgia allowed an appeal on October 5, 1928, a proper bond being made and other requirements of the law being complied with. (R., 2-14.) The case was docketed in this Court on October 29, 1928.

I.

Section 2780 of the Civil Code of Georgia of 1910 is as follows:

> "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The trial judge in interpreting this statute to the jury said:

> "I charge you that, when it has been made to appear that injury or damage has occurred

by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employes were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employes exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be entitled to recover." (R., 222.)

This charge and the validity of the statute were expressly attacked by the Railway's eighteenth ground of its motion for a new trial (R., 105-107) on the ground that they offended the due process of law and equal protection of the law clauses of the federal constitution in the following ways:*

1. Said statute as charged in the case at bar permits a party plaintiff (who was neither an employee nor had any contractual relation with the Railway) to recover without proving a single averment of negligence.

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*Typical Georgia cases so holding are *Georgia Railway and Electric Co.* v. *Bosley*, 9 Ga. App., 106, 70 S. E., 607; *Central of Georgia* v. *Hartley*, 25 Ga. App., 110, 103 S. E., 259, 261; *Payne, Agent* v. *Wells*, 28 Ga. App., 29, 109 S. E., 926; *Central of Georgia* v. *Burnett*, 35 Ga. App., 528, 134 S. E. 126, 128-129; *Ellenberg* v. *Southern Ry.*, 5 Ga. App., 389, 63 S. E., 240, 241; *Western and Atlantic Railroad* v. *Dobbs*, 36 Ga. App., 516, 137 S. E., 407.

2. Said statute does not create a mere rule of evidence. *It does not simply require a railroad to explain matters peculiarly within its knowledge.* But, on mere proof of the fact of collision with a train, it permits every averment of negligence in a plaintiff's petition, regardless of what it is, no matter how many and how fanciful, without an iota of proof to support them, to be considered as substantive evidence to be weighed by a jury against actual proof by witnesses.

3. Said statute's scope is not limited to those in privity of contract with a railroad but applies to all persons whomsoever.

4. It permits recovery on mere proof of collision without any evidence as to proximate cause.

5. The presumption created is not a reasonable, rational and rebuttable one but actually constitutes substantive evidence.

6. Said statute as construed creates a rule of liability, not of evidence.

7. It invidiously discriminates against railroads in two particulars:

(a) In every class of case sounding in tort in Georgia a party plaintiff is required to prove that some averment of negligence set forth in his petition constituted the proximate cause of the acci-

dent for which suit is brought. But this statute takes railroads out of that general and reasonable rule and permits recovery against railroads *without any proof of proximate cause.*

(b) In every class of suit in Georgia unproven averments of a plaintiff's petition are, as a matter of law, abandoned *except in suits against railroads.* This statute permits a jury to consider—and make it the basis of a verdict against a railroad—the unproven averment of a plaintiff's petition.

The constitutional question was made the basis of the Railway's seventh assignment of error in the Supreme Court of Georgia. (R., 17, 26-29.) That Court, the highest of the State, expressly considered the question and held that the state statute construed as aforesaid was valid and enforced it against the Railway. (R., 46-54.)

II.

The judgment sought to be reversed was a final one by the Supreme Court of Georgia, which is the court of last resort in that State. (R., 54.) The validity of a Georgia statute was directly challenged by the proper procedure as violating the federal constitution. The Supreme Court of Georgia expressly decided that constitutional ques-

tion in favor of the validity of the state statute. (R., 46-53.)

The jurisdiction of this honorable Court is claimed under Section 237a of the Judicial Code as amended by the Act of February 13, 1925.

The following cases sustain the right to review, formerly by writ of error, now (since the Act of January 31, 1928, as amended by the Act of April 26, 1928), by appeal:

Sultan Ry. & Timber Co. v. *Dept. of Labor and Industries of State of Washington*, 48 S. Ct., 505.
John P. King Mfg. Co. v. *City Council of Augusta*, 48 S. Ct., 489.
Miller v. *Schoene*, 48 St. Ct., 246.
Kansas City Southern Ry. v. *Road Improvement District No. 3*, 266 U. S., 379, 386.

III.

The Supreme Court of Georgia expressly overruled the Railway's claim of unconstitutionality and by its opinion and judgment actually enforced and applied said state statute under attack. (R., 32, 46-53, 54.) The validity of this statute is, therefore, subject to attack here.

Fiske v. *Kansas*, 274 U. S., 380, 385.

IV.

The constitutional question was raised as soon as possible in the motion for a new trial. (R., 105-107.) By appropriate assignment of errors it was in due course taken to the Georgia Supreme Court. (R., 17, 26-29.) *That Court expressly decided said constitutional question and that alone.* (R.,46-54.) This complies in full with the requirements of law as announced in *Mellon* v. *O'Neil*, 48 S. Ct., 62, and *Whitney* v. *California*, 274 U. S., 357, 360.

It is respectfully submitted that this honorable Court has jurisdiction of this case on appeal. Copy of this statement has been delivered to adversary counsel.

Respectfully submitted,

WESTERN & ATLANTIC RAILROAD,

BY FITZGERALD HALL,

Vice President and General Counsel.

TYE, THOMPSON & TYE,
FRANK SLEMONS,
WALTON WHITWELL,
of Counsel.

November 17, 1928.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 519

WESTERN & ATLANTIC RAILROAD, APPELLANT,

versus

MRS. MARY E. HENDERSON ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

PETITION TO REHEAR.

MAY IT PLEASE THE COURT:

Appeal papers in this case were perfected in the proper way and on November 14, 1928, the Railway, conformably to paragraph 1 of Rule 12 of this Court, filed a brief on jurisdiction alone. No effort was made to support the Federal question involved.

On January 2, 1929, this Court dismissed the appeal, not on jurisdictional grounds *but on the merits*,

citing Mobile, Jackson and Kansas City Railroad *v.* Turnipseed, 219 U. S., 35, as authority therefor.

The Railway has never had an opportunity to present its views on the ground on which the case was dismissed.

The Mississippi *Prima Facie* Act involved in the Turnipseed case is entirely different from the Georgia statute here involved. The meaning and effect of the Mississippi statute as construed by the Mississippi courts is in all respects different from the meaning and effect of the Georgia Act as construed by the Georgia courts as the attached brief will, we believe, demonstrate.

Rehearing is respectfully asked to the end that we may have the chance to at least present to the court our views on the meritorious question.

Respectfully submitted,

WESTERN AND ATLANTIC RAILROAD,

By FITZGERALD HALL,

Vice-President and General Counsel.

JANUARY 11, 1929.

I, Fitzgerald Hall, vice-president and general counsel of appellant, the Western and Atlantic Railroad, hereby certify that the meritorious question in this case has been given the best thought of which I am capable and it is my profound conviction after prolonged study that the Georgia statute under attack is invalid on the grounds stated in the attached brief which I prepared.

This petition is not filed merely to delay the payment of the judgment but in the good faith endeavor to have the Court at least read what we have to say on the merits of the Federal question.

FITZGERALD HALL.

JANUARY 11, 1929.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 519

WESTERN & ATLANTIC RAILROAD,
APPELLANT,

Versus

MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY,
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF AND ARGUMENT FOR WESTERN & ATLANTIC RAILROAD.

MAY IT PLEASE THE COURT:

J. C. Henderson of Dalton, Georgia, was employed by the Coca Cola Bottling Works as the driver of one of its trucks (R., 93) which on August 4, 1924 (R., 93) he was driving to Chattanooga for repairs (R., 95) when he collided on

a grade crossing, near Tunnel Hill, Georgia, with one of appellant's (hereinafter called the Railway) trains and was killed. (R., 93, 112-113.) His widow (hereinafter called the Plaintiff), Mrs. Mary E. Henderson, brought suit against the Railway to recover damages for his death. (R., 46-49.) The Maryland Casualty Company, which had a policy on said Coca Cola Company's employees, intervened. (R., 52-56.)

Upon trial there was a verdict against the Railway for $10,000.00. This was reversed by the Georgia Court of Appeals for a technicality in the charge not important here. (R., 25.) *Western & Atlantic R. R.* v. *Henderson*, 35 Ga. App., 353, 133 S. E., 645.

Plaintiff amended her petition (R., 25, 50) and on the second trial obtained a verdict of $15,000.00. Judgment was entered thereon. (R., 25, 57-58.) The eighteenth ground of the Railway's motion for a new trial challenged the constitutionality of Section 2780 of the 1910 Georgia Code upon which part of the trial judge's charge was based. (R., 81-82.) This was overruled (R., 60) and the Railway appealed to the Georgia Court of Appeals which affirmed the judgment below, pretermitting any discussion of said constitutional question. (R., 174-176.) *Western & Atlantic R. R.* v. *Henderson, et al*, 36 Ga. App., 679, 137 S. E., 855.

The Railway filed a petition for certiorari in the Supreme Court of Georgia (R., 10) raising said constitutional question in its seventh assignment of error (R., 20-22). *The petition was granted for the sole purpose of considering said constitutional question.* (R., 23, 34, 35.)

The judgment was affirmed. (R., 39-40.) *Western & Atlantic R. R.* v. *Henderson et al* (Georgia Supreme Court, September 15, 1928), 144 S. E., 905. The case is here on appeal, the constitutional question alone being presented. (R., 1-7.)

JURISDICTION

Conformably to paragraph 1 of Rule 12 of this Court the Railway on November 14, 1928, filed a brief on jurisdiction. No reply brief was filed.

STATEMENT OF THE CASE.

The pleadings.

The original petition filed by Plaintiff set forth the death of her husband resulting from a collision on a grade crossing between the truck he was driving and one of the Railway's trains. (R., 46-49.) The negligence relied on was thus summarized by Plaintiff herself:

> "11. That defendant was negligent and careless in failing to maintain and keep its track where the public road crossed in proper condition and repair. (b) In removing the dirt and ballast from the said tracks and leaving the crossties and railroad rails exposed and dangerous as hereinbefore set out. (c) In failing to give warning and signal of the approach of the train by blasts of the whistle and as provided by law and as heretofore set forth. (d) In failing to keep a lookout after reaching the furtherest blow-post as prescribed by law. (e) In failing to check the speed of the train after seeing plaintiff's husband crossing and on the tracks. (f) In ac-

celerating the speed of the train or engine and running into the said truck and killing her said husband. (g) In running at such great and dangerous rate of speed as heretofore mentioned and alleged upon and over the said public road crossing in said county. (h) In failing to stop the engine after the danger was apparent to the employees in charge of the engine. (i) In not having the engine under control in approaching the said crossing. All of which said acts and failures to act contributed to and wholly caused the said death of her said husband, who was in the exercise of all ordinary care and diligence." (R., 49.)

After the first trial Plaintiff amended her petition to allege that the Railway was further negligent in putting in charge of its train "a practically blind engineer." (R., 51.)

The Maryland Casualty Company, having paid Plaintiff some insurance moneys, intervened to be subrogated to part of Plaintiff's recovery, if any, against the Railway. (R., 52-56.)

The Railway's original and amended answer constituted a general denial of the averments of Plaintiff's petition, original and amended. (R., 50-51.)

The trial.

Plaintiff proved the fact of collision between the truck her husband was driving and one of the

Railway's trains and the death of her husband as a result thereof. (R., 88-89, 93-94.) *There was no proof to support in any degree many of the averments of negligence above set out*, to-wit, averments c, d, e, f, g, and i of paragraph 11 of the original petition (R., 49) set out *in extenso supra*, pages 4-5, and the averment of defective vision in the amended petition (R., 51). There was the merest shadow, if any, of proof to sustain the other averments.

Section 2780 of the 1910 Georgia Code is as follows:

> "A railroad company *shall be liable* for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, *the presumption in all cases being against the company.*" (Italics ours.)

With this as a predicate the trial judge charged:

> "I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, *the presumption arises that the railroad company*

> *and its employes were negligent in each of the particulars specified in the plaintiff's petition*, and the burden thereupon shifts to the railroad company to show that its employes exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be *entitled to recover*." (R., 165.) (Italics ours.)

This was in substance repeated later when the judge again charged:

> "The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualifications already given you, that, *when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition*, and the burden thereupon shifts to the defendant company to show that its employees exercised ordinary care and diligence in such particulars." (R., 171.) (Italics ours.)

Verdict and judgment were for Plaintiff and the intervenor. (R., 57-58.)

The eighteenth ground of the motion for a new trial challenged the validity of this charge and the

statute on which it was based on the theory, broadly speaking, that the statute as applied by the trial judge created a presumption of liability (arbitrary in character and extent), not a mere rule of evidence, and invidiously discriminated against railroads. (R., 81-82.) This was the seventh assignment of error in the Supreme Court of Georgia. (R., 20-22, 32-34.)

Opinion of the Supreme Court of Georgia.

The Supreme Court of Georgia held said Section 2780 constitutional and the challenged instructions proper. (R., 34-39, [Georgia Supreme Court, Sept. 15, 1928,] 144 S. E. 905, 909-911.) Without discussing the various grounds of attack—and without questioning the accuracy of our statement of the meaning and effect of said statute—that honorable court merely quoted at length from *Hawes* v. *Georgia*, 258 U. S. 1, and *Mobile, etc.* v. *Turnipseed*, 219 U. S. 35, and affirmed the judgment.

SPECIFICATION OF ERRORS

1. Said section 2780 of the Georgia 1910 Code as construed by the Georgia courts violates the due process of law clause of the Fourteenth Amendment to the Federal Constitution in that

(a) Said statute as charged in the case at bar permits a party plaintiff (who is neither an employee nor has any contractual relation with the defendant railroad) to recover without proving a single averment of negligence.

(b) Said statute does not create a mere rule of evidence. *It does not simply require a railroad to explain matters peculiarly within its knowledge.* But, on mere proof of the fact of collision with a train and resulting damage, it permits every averment of negligence in a plaintiff's petition, regardless of what it is, no matter how many and how fanciful, without an iota of proof to support them, to be considered as true and to be weighed as substantive evidence by a jury against actual proof by witnesses.

(c) Said statute's scope is not limited to those in privity of contract with a railroad but applies to all persons whomsoever.

(d) It permits recovery on mere proof of collision and damage without any evidence as to proximate cause.

(e) The presumption so created is not reasonable and rational. It is not limited to those things which in the normal course of events follow the proven fact. It is not rebuttable but actually has the effect of substantive evidence.

(f) Said statute as construed creates a rule of liability, not of evidence. (R., 3-4.)

2. Said section 2780 of the Georgia 1910 Code as construed by the Georgia courts violates the equal protection of the laws clause of the Fourteenth Amendment in that:

(a) In every class of cases sounding in tort in Georgia a party plaintiff is required to prove that some averment of negligence set forth in his petition constituted the proximate cause of the accident for which suit is brought. But this statute takes railroads out of that general and reasonable rule and permits recovery against railroads *without any proof of proximate cause.*

(b) In every class of suit in Georgia unproven averments of a plaintiff's petition are, as a matter of law, abandoned *except in collision cases against railroads.* This statute permits a jury to consider—and make it the basis of a verdict against a railroad—the unproven averment of a plaintiff's petition. (R., 4-5.)

3. The challenged portion of the trial judge's charge, correctly interpreting for the jury said statute as construed by the Georgia courts, was erroneous for the same reasons said statute is unconstitutional. (R., 5-7.)

ARGUMENT.

The original and amended petition contained ten separate and distinct averments of negligence. (R., 46-49, 51, pages 4-5, supra.) There was absolutely no evidence to support seven of these averments, to-wit, failure to blow the whistle properly, failure to keep a legal lookout, failure to check speed after plaintiff's husband was actually seen on the tracks, deliberately accelerating the speed of the train after her husband's dangerous predicament was seen, excessive speed, improper control of engine on approaching said crossing, running the locomotive with a "practically blind engineer."

There was only a shadow of proof to sustain the averments of improper maintenance of the track at the public crossing and negligent moving of the dirt and ballast at the crossing. (R., 49.) Obviously the engineer did not stop prior to collision.

Yet, with the record in this situation, the trial judge charged in substance that Plaintiff, having proved the fact of collision and death (of which there was no dispute), there arose a presumption that the Railway was negligent in each of the ten different ways specified in the petition, original and amended, and that unless the Railway affirmatively disproved these unproven charges Plaintiff "would be entitled to recover." (R., 165.) The jury were not even cautioned that some of these

averments had to be the proximate cause of Henderson's death in order to warrant a recovery.

There was no privity between Plaintiff's intestate and the Railway. They were strangers in law. There was no rational connection between the fact of collision and many averments in the petition. Several averments of negligence related to matters not peculiarly within the knowledge of the Railway.

JUDICIAL CONSTRUCTION OF THE STATUTE UNDER ATTACK.

The charge as given seems to be clearly in accord with the interpretation of this statute by the Georgia appellate courts to which we now invite consideration. This Court will, of course, accept as accurate the meaning and effect of this statute placed upon it by the Georgia courts. *Price* v. *Illinois*, 238 U. S., 446, 451.

(a) Mere proof of collision and damage creates a presumption of liability as to each and every averment in a plaintiff's petition, although unproven and regardless of the causal connection with the injury for which damages are sought.

In *Central of Georgia Railway Company* v. *Hartley*, 25 Georgia Appeals 110, 103 S. E. 259, 261, the court said:

> "Upon its being shown that an injury had been occasioned to the plaintiff by the running of the locomotives or cars of the defendant

> railroad company, *a presumption of liability arose** against the defendant in respect to the negligence charged, unless the company should make it appear that its agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. Civil Code 1910, Sec. 2780."

In *Western & Atlantic Railroad* v. *Dobbs*, 36 Ga. App. 516, 137 S. E. 407, the court said:

> "Under Section 2780 of the Civil Code 1910, which provides that 'a railroad company shall be liable . . . for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,' there arises, upon proof of injury to a person by a servant of a railroad company, *not only a presumption of negligence of the company, but a presumption that the company's negligence was the proximate cause of the injury.*"

In *Georgia Railway and Electric Co.* v. *Bailey*, 9 Ga. App. 106, 70 S. E. 607, 608 in the syllabus prepared by the court itself is the following:

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*Portions of various opinions are italicized for emphasis and do not so appear in the originals.

"As against a railroad company, when the plaintiff proves he was injured by the operation of its cars, and proves his damages, *the statutory presumption of negligence completes in favor of the plaintiff a case which prima facie entitles him to recover. The presumption extends to all of the acts of negligence alleged, and primarily this presumption is sufficient to prove the negligence alleged.* For this reason it is not error for the Court, in charging the jury, to refer to the acts of negligence alleged; nor can the complaint that a charge upon the law applicable to the acts of negligence alleged is unauthorized by the evidence be sustained, *where a prima facie case of liability is so established* as to require evidence on the part of the defendant to rebut it."

(b) This presumption, based solely on the mere fact of collision and injury, is given the force and effect of substantive evidence and may be weighed by a jury against actual testimony.

In *Central of Georgia Ry. Co.* v. *Barnett*, 35 Ga. App. 528, 134 S. E. 126, 128-9 the court discussing the effect of the statute in question, said:

"Generally, the burden of proof is upon the plaintiff, and this original burden remains with him throughout the trial. Thus, whatever it is necessary for the plaintiff to prove as a matter of fact in order to make out a

prima facie case must be shown and must continue to be shown, without any shift of the burden, to the satisfaction of the jury, by a preponderance of the testimony throughout the trial, but when, in the opinion of the jury, this burden has been successfully carried, and continues to be carried by a preponderance of the testimony, the statute thereupon imposes upon the defendant the counterburden of disproving, by a preponderance of the testimony, *not the facts proven in order to establish the plaintiff's prima facie case, but the presumption of negligence thus made to arise as a legal consequence of such proof.* It is upon these questions relating to its defense, and not upon the issues necessary to plaintiff's prima facie case, that the defendant is required to furnish a preponderance of the evidence. If the defendant, in seeking to comply with the obligation imposed upon it by the statute, submits evidence for the purpose of overcoming the presumption of negligence thus raised against it as a matter of law, fails to carry the burden of disproving the negligence charged, and the evidence upon that question fails to preponderate either one way or the other, then the unimpaired presumption would continue to control, and under it the defendant would be liable as if no effort had been made to rebut it."

In *Payne, Agent* v. *Wells*, 28 Ga. App. 29, 109 S. E. 926 the court in its own syllabus says:

> "The general rule, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, where the allegation is not sustained by any evidence, does not apply in an action for damages against a railroad company for a homicide, where the evidence shows that the homicide was caused by the running of the defendant's cars, *for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration*, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error for the Court, in charging the jury, to refer to all the acts of negligence alleged, *although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence.*"

In *Murphy* v. *Georgia Ry & Power Co.*, 146 Ga. 297, 91 S. E. 108, 109 the court said:

> "The first part of this charge is criticized because it required the plaintiff to prove the allegations of negligence; whereas, upon proof that her husband was injured by the running of the cars of the defendant, a presumption

arose, by virtue of the statute (Civil Code 1910, sec. 2780), that the injury was due to the company's negligence as alleged in the petition. *It is not incumbent upon the plaintiff, in a case where the injury complained of is caused by the running of the defendant's cars, to prove the allegation of negligence of the defendant by a preponderance of the evidence. Killian* v. *Georgia Railroad Co.*, 97 Ga. 727 (3), 25 S. E. 384; Civil Code 1910, sec. 2780."

In *Georgia Southern & Florida Ry.* v. *Thornton*, 144 Ga. 381, 87 S. E. 388, 390 the court said:

"That decision has been reaffirmed several times, and it has been declared that *if, without more, it should be shown by evidence that the injury on account of which the suit was brought was caused by the running of an engine or cars of the defendant, a presumption would arise that the company or its agents were guilty of the acts of negligence alleged in the petition.*"

(c) In suits against railroads there need be no proof of proximate cause provided it is a collision case and the plaintiff proves the fact of collision and damage.

In *Ellenberg* v. *Southern Railway*, 5 Ga. App. 389, 63 S. E. 240, the court in reversing a judgment for defendant railroad, said:

> "When the plaintiff proved that her husband was killed by the train, the burden did not thereafter rest on her to *show how* the fatality came about. The law immediately raised the presumption that the defendant was negligent *in every detail mentioned in the petition*, and the onus was on the company to disprove each and every efficient and proximate act of negligence stated in the petition, or to show some affirmative defense sufficient to defeat the case."

So in *Western & Atlantic Railroad* v. *Thompson*, (Court of Appeals of Ga., Sept. 25, 1928), 144 S. E. 831 the court said:

> "A presumption of negligence proximately causing an injury arises against a railroad company upon proof that the injury was caused by the operation of the defendant's train. Civil Code 1910, sec. 2780. *It is not necessary* in order to enable the plaintiff to avail himself of this presumption, *for him to prove*, otherwise than by showing that his injury was caused by the operation of the defendant's train, *that the presumed negligence of the defendant proximately caused the injury.*"

So also is *Western & Atlantic Railroad* v. *Dobbs*, quoted supra, page 14.

(d) In Georgia the law forbids a trial judge submitting to a jury any averment unsupported by proof except in collision cases where a railroad is the party defendant.

We quote again from *Payne, Agent* v. *Wells*, supra, page 17, as follows:

> "*The general rule*, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, *where the allegation is not sustained by any evidence, does not apply in an action for damages against a railroad company* for a homicide, where the evidence shows that the homicide was caused by the running of the defendant's cars, for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error for the Court, in charging the jury, to refer to all the acts of negligence alleged, although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence."

The rule—and a different rule—as to all other tort feasors is stated in the following typical cases.

> *Atlanta* v. *Stewart et al*, 117 Ga. 144, 43 S. E. 443.

Western and Atlantic Railroad v. *Branan* 123 Ga. 692, 51 S. E. 650.
White v. *Kennon*, 83 Ga. 343, 9 S. E. 1082.
Railey v. *Garbutt, et al*, 112 Ga. 288, 37 S. E. 360.

(e) In every action ex delicto in Georgia there must be proof of proximate cause except in collision cases where a railroad is the defendant.

The general rule in Georgia as elsewhere regarding proof of proximate cause is stated in *Platt* v. *Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068, 1071 as follows:

> "The plaintiff who has established the fact that a defendant has been guilty of doing what he ought not to have done, or of not doing what he ought to have done has something further to do in order to show a cause of action in his behalf. He must show, not only that he has directly or *proximately* suffered injury thereby, but also that he is so related to the duty or the neglect thereof that he has the right to complain."

That this general rule which applies to all tort feasors does not apply to railroads in collision cases is demonstrated by the quotations from *Western & Atlantic R. R.* v. *Dobbs*, *Ellenberg* v. *Southern Railway*, and *Western & Atlantic R. R.* v. *Thompson*, quoted on pages 14, 18-19, supra.

THIS GEORGIA STATUTE IS NOT DUE PROCESS OF LAW.

From the Georgia decisions just cited we glean the following: A truck driver without stopping, looking or listening drives his huge automobile onto a grade crossing, colliding with a train. The driver is injured. He sues. His counsel files a petition or declaration alleging various and manifold grounds of negligence. There is no limit as to their number or character save the fancy of the pleader. The railroad denies them all.

The case comes on for trial. Plaintiff proves the fact of collision, injury and damage—that is all. Then the challenged statute comes into play. Immediately without more, due to its provisions, there is created as a matter of law a presumption that every single averment in plaintiff's declaration is true in point of fact. The driver of the truck is not a railroad employee—that is immaterial. The alleged negligent act does not relate to a matter peculiarly within the railroad's knowledge—that is immaterial. The claimed negligence may be contrary to the general experience of mankind—that is immaterial. There may be no proof of causal connection between averment and collision—that is immaterial.

Immediately upon mere proof of collision and damage defendant railroad is presumed to be liable. To escape such liability it must proceed to

disprove every one of plaintiff's averments—although plaintiff made no effort to prove them—although they embrace matters not peculiarly within defendant's knowledge—although there is no rational connection between the fact of collision and the averments of negligence.

But that is not all. This presumption does not give way to proof but may be weighed by a jury against actual testimony. This presumption, to-wit, that an unproven averment of negligence having no causal connection with and no rational relation to the collision is true in point of fact, may be given credence by a jury as against indisputable contrary proof and sustain a verdict of liability. See the Barnett and Payne cases, pages 15-17, supra.

(a) Reasonable and rebuttable presumptions are valid.

Legislatures have a wide latitude in making the existence of a given fact actually proven in evidence presumptive evidence of some other fact which, by common experience, logically follows. Such a presumption, however, to be valid must be both reasonable and rebuttable. For example, it is not the common experience of mankind that because an automobile is struck by a train that the engineer is practically blind. On the other hand, proof that a given individual has in his possession property which may be neither made nor imported legally creates the rebuttable presumption that it

was unlawfully obtained. So the owner of a tax deed is presumed, although it is a rebuttable presumption, to have complied with the necessary conditions precedent to legal acquisition of such a deed. Proof of one fact may be made presumptive evidence of some other fact provided there is some rational connection between them. But, for example, mere proof of collision does not justify the presumption that as soon as the engineer saw the automobile he deliberately put on more speed. The following cases illustrate the general rule as to valid presumptions.

James-Dickinson Co. v. *Harry*, 273 U. S. 119, 124.
Schlesinger v. *Wisconsin*, 270 U. S. 230.
Yee Hem v. *United States*, 268 U. S. 178.
Hawes v. *Georgia*, 258 U. S. 1.
Mobile, Jackson & Kansas City R. v. *Turnipseed*, 219 U. S. 35, 42-44.

(b) Presumptions based on neither common experience nor common sense are illegal.

Two of plaintiff's averments in the case at bar are truly remarkable. One is that after the engineer actually saw the deceased truck driver's dangerous predicament he deliberately speeded up his train (R., 48-49); the other that the engineer was so blind he could not see. (R., 51.) The trial judge charged, as said Georgia statute authorized, that upon mere proof of collision and damage the

presumption arose that both of these unproven averments were true. (R., 165.)

Aside from the obvious inconsistency—one averment that the engineer saw and the other that he could not see—it is certainly not the common experience of mankind that because a locomotive strikes an automobile on a grade crossing that either the engineer is practically blind or that he deliberately speeded up to make the disaster as complete as possible. There is no rational connection between the fact of collision and these two silly averments—yet under this Georgia statute these two averments are presumed to be true and mere proof by the Railway that they were not does not terminate the presumption. The jury could still weigh in the balances this presumption of an absurdity against actual proof to the contrary.

Typical invalid presumptions are those condemned in *Bailey* v. *Alabama*, 219 U. S., 219, 237, 244, and *McFarland* v. *American Sugar Refining Co.*, 241 U. S., 79, 86, 87.

(c) Due process of law is just common sense and justice.

There is and probably could be no all-inclusive definition of due process of law. Broadly the Fourteenth Amendment limits state legislatures to enactments which do not offend fundamental principles of right, reason and justice. *Truax* v. *Cor-*

rigan, 257 U. S., 312, 324, and *Endicott* v. *Encyclopedia Press*, 266 U. S., 285.

The beauty about "due process of law" is that it is not fixed and immutable but changes with the times. The automobile has revolutionized many things—the Nation's life itself. How they are run is well known as was thus recently described by the Supreme Court of Tennessee in *Southern Railway* v. *Simpson*, 149 Tenn., 458, 462, 261 S. W., 677, 678:

> "A murderous contempt for all regulations ordained to control their movements is too common, among those operating motor vehicles, to justify the court in permitting such lawlessness to be rewarded, unless the statutes so compel."

A rule may have been very well for "horse and buggy days" but absurd today. *Euclid* v. *Ambler Realty Co.*, 272 U. S., 365, 386-7. Pretermitting other questions, in the days before good roads and automobiles, it was one thing to require a railroad to merely explain a collision with a horse and buggy—a mere rule of evidence; but, today, to say that every time a train hits an automobile it is presumptively guilty of every charge an ingenious pleader can imagine is quite another.

The Georgia Supreme Court made no attempt to discuss the various grounds of unconstitution-

ality urged upon it but merely quoted at length from two decisions of this honorable Court, neither of which touch the questions we raise nor contain anything militating against our position. (R., 34-39.)

(d) Hawes v. Georgia, 258 U. S. 1.

Hawes was indicted under a Georgia prohibition act making it unlawful to manufacture intoxicating liquors. One section of this act made proof of the existence of distilling apparatus on the premises *prima facie* evidence that the person "in actual possession" of such premises had knowledge of the same. A still, boxes and barrels were found in three hundred yards of Hawes' house. An old path led from the premises to the still. Hawes made no attempt to deny or explain. He was found guilty. It was claimed that the presumptive section of the Georgia act was invalid but this court held otherwise, saying:

> "Distilling spirits is not an ordinary incident of a farm and in a prohibition State has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the contrary, it may be presumed that one on such a farm or one who occupies it will know what there is upon it. It is not arbitrary for the State to act upon the presump-

> tion and erect it into evidence of knowledge; not peremptory, of course, but subject to explanation, and affording the means of explanation. Hawes had such means. An explanatory statement was open to him with a detail of the circumstances of his acquisition of the place, and he availed himself of it. He could have called others to testify to the circumstances of his acquisition, for the circumstances were not so isolated or secret as not to have been known to others." (Pages 4-5.)

The presumption so sustained was neither unreasonable nor conclusive. There was a rational relation between the existence of the still on Hawes' place near his house connected by an old path and his knowledge of its presence.

How different the case at bar. Plaintiff proved a collision between the truck her husband was driving and one of the Railway's trains—the trial judge thereupon charged on authority of the statute under attack in effect, among other things, that proof of the fact of collision and Henderson's death justified the presumption, first, that the engineer after seeing the truck driver's dangerous predicament deliberately speeded up his train, and second, that the engineer was practically blind.

There is no rational connection between the proven fact and the presumed fact. It is common

knowledge that railroads do not entrust locomotives to men who cannot see—the mere wearing of glasses is no evidence of practical blindness. Likewise it is common knowledge that engineers put on brakes, not more steam, when automobiles get on the tracks. The Hawes case is no authority for the validity of the Georgia statute now under attack.

(c) Mobile, Jackson and Kansas City Ry. v. Turnipseed, 219 U. S. 35.

Hicks was an employee of the railroad and was killed while on duty. His administrator, Turnipseed, sued his employer in a Mississippi state court. Plaintiff won below and in the Supreme Court of Mississippi. The trial judge applied section 1985 of the Mississippi Code which is as follows:

> "Injury to Persons or Property by Railroads *prima facie* Evidence of Want of Skill, etc. In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employes of railroad companies."

This statute was attacked on the ground that it violated the due process and equality clauses of the Fourteenth Amendment.

This Court sustained the act on the ground that (1) it constituted a mere rule of evidence not a rule of liability (see *Easterling Lumber Co.* v. *Pierce*, 235 U. S., 380, 382, specifically so holding; (2) was limited to cases where either an employee or passenger sued—in other words, it applies only where plaintiff and defendant railroad are related by contract; (3) created a mere rebuttable inference relating to a matter peculiarly within the railroad's knowledge; (4) as soon as proof was introduced the inference ended—in other words, the presumption could not be weighed against actual testimony; (5) such a rebuttable and reasonable inference or presumption was valid when there was "some rational connection between the fact proved and the ultimate fact presumed . . ."

The Supreme Court of Mississippi in construing this statute in *Columbus & G. Ry.* v. *Fondren*, 145 Miss., 679, 110 Southern Reporter, 365, said:

> "We think the court erred in granting the instructions for plaintiff on the *prima facie* negligence statute, for which error the judgment must be reversed. As stated, numerous witnesses testified as to how the injury occurred; and, while there was a conflict in the testimony as to how it happened, the jury had before it the testimony fully explaining how the injury occurred, and *it was the duty of the jury to decide the issue of negligence or*

not from the proof in the case, and not from the presumption of negligence under the prima facie statute. These instructions should not have been given, and we do not find any other instructions on this phase of the case which would cure the error or render the erroneous instructions harmless in the case.

"We see no use in again discussing this *prima facie* negligence statute. The rule laid down in *G. M. & N. R. R. Co.* v. *Brown*, 138 Miss., 39, 102 So., 855; *Davis* v. *Temple*, 129 Miss., 6, 91 So., 689; *G. M. & N. R. R. Co.* v. *Arrington* (Miss.), 107 So., 378; *Davis* v. *Elzey*, 126 Miss., 789, 88 So., 630, 89 So., 666; *A. & V. Ry. Co.* v. *Thornhill*, 106 Miss., 387, 63 So., 674; *Ala. Gr. So. R. R. Co.* v. *Daniell*, 108 Miss., 358, 66 So., 732; *Owen* v. *I. C. R. R. Co.*, 77 Miss., 142, 24 So., 899—seems to us to be clear and definite, and must be followed in such cases. In *G. M. & N. R. R. Co.* v. *Arrington, supra*, in which the question of whether or not the court erred in granting a *prima facie* negligence instruction where the testimony explained how the injury occurred, the court said:

" 'This instruction ought not to have been given because the testimony in the case sufficiently explains every material fact connected with the infliction of the injury, and clearly shows how the injury occurred; therefore, it was error to tell the jury that "the burden is

upon the defendant to 'exculpate' itself from any and all negligence" . . . But we shall say just one more thing in connection with this statute, and that is that, after it has served its purpose in the trial by compelling the railroad (company) to explain how the injury occurred, then the question of negligence or not is to be decided from the facts in the case.'

"And again, in the Brown case, *supra*, the court said:

" 'Where the facts are in evidence, the jury must determine the negligence or lack of negligence from the evidence and not from the statute.'

"Where the defendant's version of the facts is disputed by the plaintiff, then the duty devolves upon the jury to determine the truthfulness of the testimony; they cannot sidestep that duty by invoking the statute in such cases.

"In view of the conclusion reached, the judgment of the lower court is reversed and the case remanded."

Again, in *Gulf, etc. R. R.* v. *Brown*, 138 Miss., 39, 102 Southern Reporter, 855, the court said:

"In our opinion it was improper to invoke the *prima facie* statute as was done in instruction No. 6 for the plaintiff set out above. It

has often been held by this Court that where the facts are in evidence, *the jury must determine the negligence or lack of negligence from the evidence and not from the statute.* It was especially improper and harmful for the court to instruct the jury that the facts so proven must exonerate the railroad company from blame, otherwise the railroad company is not relieved from liability and the presumption controls."

How differently the Mississippi courts construed the Mississippi Prima Facie Act from the construction by the Georgia courts of the Georgia presumptive statute under attack.

This Mississippi Prima Facie Act, as construed by the Mississippi courts and this Court, is a mere rule of evidence obtaining only when the plaintiff and defendant are related by privity of contract and merely requires a railroad to explain matters peculiarly within its knowledge. The inference or presumption created by this Mississippi statute may not be weighed against substantive evidence. A jury must rest their verdict exclusively on the testimony—laying to one side the statute.

Burden of proof is a matter of substance and not a mere rule of evidence. *New Orleans & Northeastern R. R.* v. *Harris, Admr.*, 247 U. S.,

367, 372. It is one thing to provide by statute a reasonable rule of evidence as is done by the Mississippi Prima Facie Act; quite another to permit unproven averments, having no rational connection with those proven, to constitute substantive evidence and be the basis of a verdict and judgment as is done by the Georgia act under attack. This is not due process of law.

(f) Proof of proximate cause is indispensable to due process of law.

It is elemental that a party defendant may not be mulcted in damages merely because of negligence. The negligent act must cause, in whole or in part, the injury complained of. In the case at bar all Plaintiff had to do was to prove the fact of collision and damage. Then unless the Railway disproved the many fanciful and absurd averments of Plaintiff's petition, some of which Plaintiff did not even try to prove, a verdict against the Railway was justified by the statute.

Proximate cause is not a fact which is subject to inference or presumption. It must be proved and so proved as to take the cause of the accident out of "the realm of speculation and conjecture." *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U. S., 472, 478. Under this Georgia statute there may be a verdict against a railroad without any proof as to proximate cause. (See the Thompson case, page 19, supra.)

(g) Conclusion.

It is respectfully submitted that this Georgia act as construed by the Georgia courts offends the due process of law clause of the Fourteenth Amendment because,

1. It violates that fundamental principle of Anglo-Saxon jurisprudence that *allegata* and *probata* must correspond. *Southern Railway* v. *King*, 217 U. S., 524, 536; *United States* v. *Commissioner of Immigration*, 273 U. S., 103, 106. In the case at bar the jury were permitted to consider, in arriving at their verdict, seven averments of negligence supported by no proof.

2. Mere proof of collision without any proof of proximate cause will justify a verdict.

3. The presumption created is neither reasonable nor rebuttable. It is unreasonable because not limited by common experience or common sense. Proof of one fact will support the presumption of another fact with which it has no rational connection. It is not rebuttable because a jury may weigh this presumption against actual testimony.

4. It creates not a mere rule of evidence but a rule of liability between strangers.

This honorable Court in common with the public at large knows that the average driver of an

automobile does not stop, look and listen when approaching grade crossings (*Baltimore & Ohio* v. *Goodman*, 275 U. S., 66, 70) and constantly violates rules of the road and speed restrictions (*Southern Railway* v. *Simpson*, 149 Tenn., 458, 462). Automobiles now are in universal use, not only as pleasure cars but as means of private and public transportation. They are engaged in the common carrier business just as railroads. When one of these trucks, as in the instant case, dashes on to a railroad crossing and a collision occurs, there is neither justice nor common sense in presuming that the fault lay with the railroad. Common experience of mankind does not support such a presumption. We all know—it is common knowledge—that most collisions are due to the failure of the driver to stop, look or listen. To go further and hold that in such a case a legislature may enact a statute which permits the automobile driver to aver any number of different grounds of negligence and then merely prove the single fact of collision and recover on such unproven averments unless affirmatively disproved by the defendant—the jury being permitted to consider the unproven averments as substantive evidence as against actual testimony of the defendant—is so palpably arbitrary and unreasonable as to offend the fundamental conception of justice brought into our organic law by the Fourteenth Amendment.

THE GEORGIA STATUTE DENIES RAILROADS THE EQUAL PROTECTION OF THE LAWS.

(a) Unproven averments of negligence are as a matter of law dropped from consideration by a jury except in collision cases against railroads.

The general rule in Georgia requires a plaintiff to allege the negligence on account of which recovery is sought and then prove it. (See cases cited pages 20-21, supra.)

This is not required in the single class of cases where a railroad is the party defendant and the accident results from train operations.

In *Payne, Agent* v. *Wells*, 28 Ga. App., 29, 109 S. E., 926, the syllabus by the court is as follows:

> "*The general rule*, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, where the allegation is not sustained by any evidence, *does not apply in an action for damages against a railroad company for a homicide*, where the evidence shows that the homicide was caused by the running of the defendant's cars, for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error

> for the court, in charging the jury, to refer to all the acts of negligence alleged, although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence."

In other words, there is one law in Georgia for railroads and another for all other *tort feasors.*

In *Truax* v. *Corrigan*, 257 U. S., 312, this Court held that the requirements of the Fourteenth Amendment that no state should deny to any person the equal protection of the laws was aimed at "undue favor and individual or class privilege on the one hand and at hostile discrimination or the oppression of inequality on the other . . . Indeed, protection is not protection unless it does so."

In that case it was held that a state statute making a distinction "between the ex-employes and other *tort feasors* in the matter of remedies" violates the equality clause.

In every other case in Georgia a plaintiff abandons as a matter of law unproven averments of fact in his petition or declaration. Only in the case of a railroad may a plaintiff aver a fact, decline to even try to prove it and recover a judgment thereon. Only in suits against railroads may the unproven allegation in a pleading be considered actual evidence of the truth thereof.

The object and intent of this Georgia statute as construed by the Georgia courts is not reasonable or fair but constitutes invidious discrimination without any grounds in reason or equity therefor against railroads.

When a great automobile truck, almost as large as a box car, dashes on to a railroad crossing, the driver neither stopping, nor looking nor listening and a collision occurs, the driver suing in Georgia may aver numerous and sundry grounds of negligence in his petition or declaration and then prove the mere fact of collision and damage and this without more will warrant a verdict and judgment. Whereas, the railroad if it sues the truck driver must affirmatively prove by evidence the negligence averred in its petition and that it was the proximate cause of the collision. The Georgia rule is one that does not work both ways. It is respectfully submitted that it is unfair and constitutes an unjust and invidious discrimination against railroads and therefore violates the equal protection of the laws clause of the Fourteenth Amendment.

(b) Proof of proximate cause is required in all tort cases except when a railroad is the defendant in a collision case.

It is the general rule in Georgia that a party plaintiff suing in *tort* must prove that some averment in his declaration caused or contributed to the accident complained of. (See cases on page 21, supra.) This reasonable rule seems to be uni-

versal except when a railroad is sued in a collision case. (See cases, page 21, supra.)

In the case at bar the trial judge specifically authorized a verdict against the Railway upon mere proof of the fact of collision and damage unless the Railway affirmatively disproved all the averments of negligence in plaintiff's declaration, proven or unproven. *Proximate cause was ignored.*

It is respectfully submitted that, while the classification of railroads for many purposes is justified, to take them out of the general rule requiring proof of proximate cause in actions *ex delicto* can be based on no rational grounds. It is simply invidious discrimination. *Truax* v. *Corrigan*, 257 U. S., 312, 331-334, 335-340.

It is respectfully submitted that Section 2780 of the 1910 Georgia Code as construed by the Georgia courts and applied in the case at bar is unconstitutional and that the charge of the trial judge enforcing it against the Railway was erroneous.

Respectfully submitted,

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Fourteenth Amendment to Constitution of the United States 9, 25, 29, 35, 36, 39

Georgia Code, 1910, Section 2780 ..... 2, 6, 8, 9, 10, 40

Mississippi Code, Section 1985 (Mississippi Prima Facie Act) 29, 33, 34

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 519.

WESTERN & ATLANTIC RAILROAD,
APPELLANT,

Versus

MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY.
APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF AND ARGUMENT FOR WESTERN & ATLANTIC RAILROAD.

MAY IT PLEASE THE COURT:

J. C. Henderson of Dalton, Georgia, was employed by the Coca Cola Bottling Works as the driver of one of its trucks (R., 93) which on August 4, 1924 (R., 93) he was driving to Chattanooga for repairs (R., 95) when he collided on

a grade crossing, near Tunnel Hill, Georgia, with one of appellant's (hereinafter called the Railway) trains and was killed. (R., 93, 112-113.) His widow (hereinafter called the Plaintiff), Mrs. Mary E. Henderson, brought suit against the Railway to recover damages for his death. (R., 46-49.) The Maryland Casualty Company, which had a policy on said Coca Cola Company's employees, intervened. (R., 52-56.)

Upon trial there was a verdict against the Railway for $10,000.00. This was reversed by the Georgia Court of Appeals for a technicality in the charge not important here. (R., 25.) *Western & Atlantic R. R.* v. *Henderson*, 35 Ga. App., 353, 133 S. E., 645.

Plaintiff amended her petition (R., 25, 50) and on the second trial obtained a verdict of $15,000.00. Judgment was entered thereon. (R., 25, 57-58.) The eighteenth ground of the Railway's motion for a new trial challenged the constitutionality of Section 2780 of the 1910 Georgia Code upon which part of the trial judge's charge was based. (R., 81-82.) This was overruled (R., 60) and the Railway appealed to the Georgia Court of Appeals which affirmed the judgment below, pretermitting any discussion of said constitutional question. (R., 174-176.) *Western & Atlantic R. R.* v. *Henderson, et al*, 36 Ga. App., 679, 137 S. E., 855.

The Railway filed a petition for certiorari in the Supreme Court of Georgia (R., 10) raising said constitutional question in its seventh assignment of error (R., 20-22). *The petition was granted for the sole purpose of considering said constitutional question.* (R., 23, 34, 35.)

The judgment was affirmed. (R., 39-40.) *Western & Atlantic R. R.* v. *Henderson, et al* (Georgia Supreme Court, September 15, 1928), 144 S. E., 905. The case is here on appeal, the constitutional question alone being presented. (R., 1-7.)

JURISDICTION

Conformably to paragraph 1 of Rule 12 of this Court the Railway on November 14, 1928, filed a brief on jurisdiction. No reply brief was filed.

STATEMENT OF THE CASE

The pleadings.

The original petition filed by Plaintiff set forth the death of her husband resulting from a collision on a grade crossing between the truck he was driving and one of the Railway's trains. (R., 46-49.) The negligence relied on was thus summarized by Plaintiff herself:

> "11. That defendant was negligent and careless in failing to maintain and keep its track where the public road crossed in proper condition and repair. (b) In removing the dirt and ballast from the said tracks and leaving the crossties and railroad rails exposed and dangerous as hereinbefore set out. (c) In failing to give warning and signal of the approach of the train by blasts of the whistle and as provided by law and as heretofore set forth. (d) In failing to keep a lookout after reaching the furtherest blow-post as prescribed by law. (e) In failing to check the speed of the train after seeing plaintiff's husband crossing and on the tracks. (f) In accelerating the speed of the train or engine and running into the said truck and killing

her said husband. (g) In running at such great and dangerous rate of speed as heretofore mentioned and alleged upon and over the said public road crossing in said county. (h) In failing to stop the engine after the danger was apparent to the employees in charge of the engine. (i) In not having the engine under control in approaching the said crossing. All of which said acts and failures to act contributed to and wholly caused the said death of her said husband, who was in the exercise of all ordinary care and diligence." (R., 49.)

After the first trial Plaintiff amended her petition to allege that the Railway was further negligent in putting in charge of its train "a practically blind engineer." (R., 51.)

The Maryland Casualty Company, having paid Plaintiff some insurance moneys, intervened to be subrogated to part of Plaintiff's recovery, if any, against the Railway. (R., 52-56.)

The Railway's original and amended answer constituted a general denial of the averments of Plaintiff's petition, original and amended. (R., 50-51.)

The trial.

Plaintiff proved the fact of collision between the truck her husband was driving and one of the Railway's trains and the death of her husband as a result thereof. (R., 88-89, 93-94.) *There was no proof to support in any degree many of the aver-*

ments of negligence above set out, to-wit, averments *c*, d, e, f, g, and i of paragraph 11 of the original petition (R., 49) set out *in extenso supra*, pages 4-5, and the averment of defective vision in the amended petition (R., 51). There was the merest shadow, if any, of proof to sustain the other averments.

Section 2780 of the 1910 Georgia Code is as follows:

> "A railroad company *shall be liable* for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, *the presumption in all cases being against the company.*" (Italics ours.)

With this as a predicate the trial judge charged:

> "I charge you that, when it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, *the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition*, and the burden thereupon shifts to the railroad company to show that its employees exer-

cised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for the recovery of damages by reason of such injury, would be *entitled to recover.*" (R., 165.) (Italics ours.)

This was in substance repeated later when the judge again charged:

> "The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualifications already given you, that, *when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition*, and the burden thereupon shifts to the defendant company to show that its employees exercised ordinary care and diligence in such particulars." (R., 171.) (Italics ours.)

Verdict and judgment were for Plaintiff and the intervenor. (R., 57-58.)

The eighteenth ground of the motion for a new trial challenged the validity of this charge and the statute on which it was based on the theory, broadly speaking, that the statute as applied by the trial judge created a presumption of liability (arbitrary in character and extent), not a mere rule

of evidence, and invidiously discriminated against railroads. (R., 81-82.) This was the seventh assignment of error in the Supreme Court of Georgia. (R., 20-22, 32-34.)

Opinion of the Supreme Court of Georgia.

The Supreme Court of Georgia held said Section 2780 constitutional and the challenged instructions proper. (R., 34-39, [Georgia Supreme Court, Sept. 15, 1928,] 144 S. E., 905, 909-911.) Without discussing the various grounds of attack—and without questioning the accuracy of our statement of the meaning and effect of said statute—that honorable court merely quoted at length from *Hawes* v. *Georgia*, 258 U. S., 1, and *Mobile, etc.* v. *Turnipseed*, 219 U. S., 35, and affirmed the judgment.

Petition to rehear.

On January 2, 1929, before briefs on the merits had been filed, the appeal in this case was dismissed by this Court "for want of a substantial Federal question on the authority of *Mobile, Jackson & Kansas City R. R.* v. *Turnipseed*, 219 U. S., 35."

On January 11, 1929, petition to rehear with brief was filed in an effort to differentiate the Georgia statute here under attack and the Mississippi statute involved in the Turnipseed case. On January 21, 1929, said petition was granted and the case restored to the calendar for argument.

SPECIFICATION OF ERRORS

1. Said section 2780 of the Georgia 1910 Code as construed by the Georgia courts violates the due process of the law clause of the Fourteenth Amendment to the Federal Constitution in that

(a) Said statute as charged in the case at bar permits a party plaintiff (who is neither an employee nor has any contractual relation with the defendant railroad) to recover without proving a single averment of negligence.

(b) Said statute does not create a mere rule of evidence. *It does not simply require a railroad to explain matters peculiarly within its knowledge.* But, on mere proof of the fact of collision with a train and resulting damage, it permits every averment of negligence in a plaintiff's petition, regardless of what it is, no matter how many and how fanciful, without an iota of proof to support them, to be considered as true and to be weighed as substantive evidence by a jury against actual proof by witnesses.

(c) Said statute's scope is not limited to those in privity of contract with a railroad but applies to all persons whomsoever.

(d) It permits recovery on mere proof of collision and damage without any evidence as to proximate cause.

(e) The presumption so created is not reasonable and rational. It is not limited to those things which in the normal course of events follow the proven fact. It is not rebuttable but actually has the effect of substantive evidence.

(f) Said statute as construed creates a rule of liability, not of evidence. (R., 3-4.)

2. Said section 2780 of the Georgia 1910 Code as construed by the Georgia courts violates the equal protection of the laws clause of the Fourteenth Amendment in that:

(a) In every class of cases sounding in tort in Georgia a party plaintiff is required to prove that some averment of negligence set forth in his petition constituted the proximate cause of the accident for which suit is brought. But this statute takes railroads out of that general and reasonable rule and permits recovery against railroads *without any proof of proximate cause.*

(b) In every class of suit in Georgia unproven averments of a plaintiff's petition are, as a matter of law, abandoned *except in collision cases against railroads.* This statute permits a jury to consider—and make it the basis of a verdict against a railroad—the unproven averment of a plaintiff's petition. (R., 4-5.)

3. The challenged portion of the trial judge's charge, correctly interpreting for the jury said statute as construed by the Georgia courts, was erroneous for the same reasons said statute is unconstitutional. (R., 5-7.)

ARGUMENT

The original and amended petition contained ten separate and distinct averments of negligence. (R., 46-49, 51, pages 4-5, *supra.*) There was absolutely no evidence to support seven of these averments, to-wit, failure to blow the whistle properly, failure to keep a legal lookout, failure to check speed after plaintiff's husband was actually seen on the tracks, deliberately accelerating the speed of the train after her husband's dangerous predicament was seen, excessive speed, improper control of engine on approaching said crossing, running the locomotive with a "practically blind engineer."

There was only a shadow of proof to sustain the averments of improper maintenance of the track at the public crossing and negligent moving of the dirt and ballast at the crossing. (R., 49.) Obviously the engineer did not stop prior to collision.

Yet, with the record in this situation, the trial judge charged in substance that Plaintiff, having proved the fact of collision and death (of which there was no dispute), there arose a presumption that the Railway was negligent in each of the ten different ways specified in the petition, original and amended, and that unless the Railway affirmatively disproved these unproven charges Plaintiff "would be entitled to recover." (R., 165.) The jury were not even cautioned that some of these

averments had to be the proximate cause of Henderson's death in order to warrant a recovery.

There was no privity between Plaintiff's intestate and the Railway. They were strangers in law. There was no rational connection between the fact of collision and many averments in the petition. Several averments of negligence related to matters not peculiarly within the knowledge of the Railway.

JUDICIAL CONSTRUCTION OF THE STATUTE UNDER ATTACK.

The charge as given seems to be clearly in accord with the interpretation of this statute by the Georgia appellate courts to which we now invite consideration. This Court will, of course, accept as accurate the meaning and effect of this statute placed upon it by the Georgia courts. *Price* v. *Illinois*, 238 U. S., 446, 451.

(a) Mere proof of collision and damage creates a presumption of liability as to each and every averment in a plaintiff's petition, although unproven and regardless of the causal connection with the injury for which damages are sought.

In *Central of Georgia Railway Company* v. *Hartley*, 25 Georgia Appeals 110, 103 S. E., 259, 261, the court said:

> "Upon its being shown that an injury had been occasioned to the plaintiff by the running of the locomotives or cars of the defendant

railroad company, *a presumption of liability arose** against the defendant in respect to the negligence charged, unless the company should make it appear that its agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. Civil Code 1910, Sec. 2780."

In *Western & Atlantic Railroad* v. *Dobbs*, 36 Ga. App., 516, 137 S. E., 407, the court said:

> "Under Section 2780 of the Civil Code 1910, which provides that 'a railroad company shall be liable . . . for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,' there arises, upon proof of injury to a person by a servant of a railroad company, *not only a presumption of negligence of the company, but a presumption that the company's negligence was the proximate cause of the injury.*"

In *Georgia Railway and Electric Co.* v. *Bailey*, 9 Ga. App. 106, 70 S. E., 607, 608 in the syllabus prepared by the court itself is the following:

*Portions of various opinions are italicized for emphasis and do not so appear in the originals.

"As against a railroad company, when the plaintiff proves he was injured by the operation of its cars, and proves his damages, *the statutory presumption of negligence completes in favor of the plaintiff a case which prima facie entitles him to recover. The presumption extends to all of the acts of negligence alleged, and primarily this presumption is sufficient to prove the negligence alleged.* For this reason it is not error for the Court, in charging the jury, to refer to the acts of negligence alleged; nor can the complaint that a charge upon the law applicable to the acts of negligence alleged is unauthorized by the evidence be sustained, *where a prima facie case of liability is so established* as to require evidence on the part of the defendant to rebut it."

(b) This presumption, based solely on the mere fact of collision and injury, is given the force and effect of substantive evidence and may be weighed by a jury against actual testimony.

In *Central of Georgia Ry. Co.* v. *Barnett*, 35 Ga. App., 528, 134 S. E., 126, 128-9 the court discussing the effect of the statute in question said:

"Generally, the burden of proof is upon the plaintiff, and this original burden remains with him throughout the trial. Thus, whatever it is necessary for the plaintiff to prove as a matter of fact in order to make out a

prima facie case must be shown and must continue to be shown, without any shift of the burden, to the satisfaction of the jury, by a preponderance of the testimony throughout the trial, but when, in the opinion of the jury, this burden has been successfully carried, and continues to be carried by a preponderance of the testimony, the statute thereupon imposes upon the defendant the counterburden of disproving, by a preponderance of the testimony, *not the facts proven in order to establish the plaintiff's prima facie case, but the presumption of negligence thus made to arise as a legal consequence of such proof.* It is upon these questions relating to its defense, and not upon the issues necessary to plaintiff's *prima facie* case, that the defendant is required to furnish a preponderance of the evidence. If the defendant, in seeking to comply with the obligation imposed upon it by the statute, submits evidence for the purpose of overcoming the presumption of negligence thus raised against it as a matter of law, fails to carry the burden of disproving the negligence charged, and the evidence upon that question fails to preponderate either one way or the other, then the unimpaired presumption would continue to control, and under it the defendant would be liable as if no effort had been made to rebut it."

In *Payne, Agent* v. *Wells*, 28 Ga. App., 29, 109 S. E., 926, the court in its own syllabus says:

> "The general rule, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, where the allegation is not sustained by any evidence, does not apply in an action for damages against a railroad company for a homicide, where the evidence shows that the homicide was caused by the running of the defendant's cars, *for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration*, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error for the Court, in charging the jury, to refer to all the acts of negligence alleged, *although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence.*"

In *Murphy* v. *Georgia Ry & Power Co.*, 146 Ga., 297, 91 S. E., 108, 109, the court said:

> "The first part of this charge is criticized because it required the plaintiff to prove the allegations of negligence; whereas, upon proof that her husband was injured by the running of the cars of the defendant, a presumption

arose, by virtue of the statute (Civil Code 1910, sec. 2780), that the injury was due to the company's negligence as alleged in the petition. *It is not incumbent upon the plaintiff, in a case where the injury complained of is caused by the running of the defendant's cars, to prove the allegation of negligence of the defendant by a preponderance of the evidence. Killian* v. *Georgia Railroad Co.*, 97 Ga., 727 (3), 25 S. E. 384; Civil Code 1910, sec. 2780."

In *Georgia Southern & Florida Ry.* v. *Thornton*, 144 Ga., 381, 87 S. E., 388, 390, the court said:

"That decision has been reaffirmed several times, and it has been declared that *if, without more, it should be shown by evidence that the injury on account of which the suit was brought was caused by the running of an engine or cars of the defendant, a presumption would arise that the company or its agents were guilty of the acts of negligence alleged in the petition.*"

(c) In suits against railroads there need be no proof of proximate cause provided it is a collision case and the plaintiff proves the fact of collision and damage.

In *Ellenberg* v. *Southern Railway*, 5 Ga. App., 389, 63 S. E., 240, the court in reversing a judgment for defendant railroad, said:

> "When the plaintiff proved that her husband was killed by the train, the burden did not thereafter rest on her to *show how* the fatality came about. The law immediately raised the presumption that the defendant was negligent *in every detail mentioned in the petition*, and the onus was on the company to disprove each and every efficient and proximate act of negligence stated in the petition, or to show some affirmative defense sufficient to defeat the case."

So in *Western & Atlantic Railroad* v. *Thompson*, (Court of Appeals of Ga., Sept. 25, 1928), 144 S. E., 831, the court said:

> "A presumption of negligence proximately causing an injury arises against a railroad company upon proof that the injury was caused by the operation of the defendant's train. Civil Code 1910, sec. 2780. *It is not necessary* in order to enable the plaintiff to avail himself of this presumption, *for him to prove*, otherwise than by showing that his injury was caused by the operation of the defendant's train, *that the presumed negligence of the defendant proximately caused the injury.*"

So also is *Western & Atlantic Railroad* v. *Dobbs*, quoted *supra*, page 14.

(d) In Georgia the law forbids a trial judge submitting to a jury any averment unsupported by proof except in collision cases where a railroad is the party defendant.

We quote again from *Payne, Agent* v. *Wells, supra*, page 17, as follows:

> "*The general rule*, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, *where the allegation is not sustained by any evidence, does not apply in an action for damages against a railroad company* for a homicide, where the evidence shows that the homicide was caused by the running of the defendant's cars, for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error for the Court, in charging the jury, to refer to all the acts of negligence alleged, although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence."

The rule—and a different rule—as to all other tort feasors is stated in the following typical cases.

> *Atlanta* v. *Stewart et al*, 117 Ga. 144, 43 S. E., 443.

Western and Atlantic Railroad v. *Branan* 123 Ga., 692, 51 S. E., 650.
White v. *Kennon*, 83 Ga. 343, 9 S. E. 1082.
Railey v. *Garbutt, et al*, 112 Ga. 288, 37 S. E. 360.

(e) In every action ex delicto in Georgia there must be proof of proximate cause except in collision cases where a railroad is the defendant.

The general rule in Georgia as elsewhere regarding proof of proximate cause is stated in *Platt* v. *Southern Photo Material Co.*, 4 Ga. App. 159, 60 S. E. 1068, 1071 as follows:

> "The plaintiff who has established the fact that a defendant has been guilty of doing what he ought not to have done, or of not doing what he ought to have done has something further to do in order to show a cause of action in his behalf. He must show, not only that he has *directly and proximately* suffered injury therefrom, but also that he is so related to the duty and the neglect thereof that he has the right to complain."

That this general rule which applies to all tort feasors does not apply to railroads in collision cases is demonstrated by the quotations from *Western & Atlantic R. R.* v. *Dobbs*, *Ellenberg* v. *Southern Railway*, and *Western & Atlantic R. R.* v. *Thompson*, quoted on pages 14, 18-19, *supra*.

THIS GEORGIA STATUTE IS NOT DUE PROCESS OF LAW.

From the Georgia decisions just cited we glean the following: A truck driver without stopping, looking or listening drives his huge automobile onto a grade crossing, colliding with a train. The driver is injured. He sues. His counsel files a petition or declaration alleging various and manifold grounds of negligence. There is no limit as to their number or character save the fancy of the pleader. The railroad denies them all.

The case comes on for trial. Plaintiff proves the fact of collision, injury and damage—that is all. Then the challenged statute comes into play. Immediately without more, due to its provisions, there is created as a matter of law a presumption that every single averment in plaintiff's declaration is true in point of fact. The driver of the truck is not a railroad employee—that is immaterial. The alleged negligent act does not relate to a matter peculiarly within the railroad's knowledge—that is immaterial. The claimed negligence may be contrary to the general experience of mankind—that is immaterial. There may be no proof of causal connection between averment and collision —that is immaterial.

Immediately upon mere proof of collision and damage defendant railroad is presumed to be liable. To escape such liability it must proceed to

disprove every one of plaintiff's averments—although plaintiff made no effort to prove them—although they embrace matters not peculiarly within defendant's knowledge—although there is no rational connection between the fact of collision and the averments of negligence.

But that is not all. This presumption does not give way to proof but may be weighed by a jury against actual testimony. This presumption, to-wit, that an unproven averment of negligence having no causal connection with and no rational relation to the collision is true in point of fact, may be given credence by a jury as against indisputable contrary proof and sustain a verdict of liability. See the Barnett and Payne cases, pages 15-17, *supra*.

(a) Reasonable and rebuttable presumptions are valid.

Legislatures have a wide latitude in making the existence of a given fact actually proven in evidence presumptive evidence of some other fact which, by common experience, logically follows. Such a presumption, however, to be valid must be both reasonable and rebuttable. For example, it is not the common experience of mankind that because an automobile is struck by a train that the engineer is practically blind. On the other hand, proof that a given individual has in his possession property which may be neither made nor imported legally creates the rebuttable presumption that it

was unlawfully obtained. So the owner of a tax deed is presumed, although it is a rebuttable presumption, to have complied with the necessary conditions precedent to legal acquisition of such a deed. Proof of one fact may be made presumptive evidence of some other fact provided there is some rational connection between them. But, for example, mere proof of collision does not justify the presumption that as soon as the engineer saw the automobile he deliberately put on more speed. The following cases illustrate the general rule as to valid presumptions.

James-Dickinson Co. v. *Harry*, 273 U. S. 119, 124.
Schlesinger v. *Wisconsin*, 270 U. S. 230.
Yee Hem v. *United States*, 268 U S., 178.
Hawes v. *Georgia*, 258 U. S. 1.
Mobile, Jackson & Kansas City R. v. *Turnipseed*, 219 U. S. 35, 42-44.

(b) Presumptions based on neither common experience nor common sense are illegal.

Two of plaintiff's averments in the case at bar are truly remarkable. One is that after the engineer actually saw the deceased truck driver's dangerous predicament he deliberately speeded up his train (R., 48-49); the other that the engineer was so blind he could not see. (R., 51.) The trial judge charged, as said Georgia statute authorized, that upon mere proof of collision and damage the

presumption arose that both of these unproven averments were true. (R., 165.)

Aside from the obvious inconsistency—one averment that the engineer saw and the other that he could not see—it is certainly not the common experience of mankind that because a locomotive strikes an automobile on a grade crossing that either the engineer is practically blind or that he deliberately speeded up to make the disaster as complete as possible. There is no rational connection between the fact of collision and these two silly averments—yet under this Georgia statute these two averments are presumed to be true and mere proof by the Railway that they were not does not terminate the presumption. The jury could still weigh in the balances this presumption of an absurdity against actual proof to the contrary.

Typical invalid presumptions are those condemned in *Bailey* v. *Alabama*, 219 U. S., 219, 237, 244, and *McFarland* v. *American Sugar Refining Co.*, 241 U. S., 79, 86, 87.

(c) Due process of law is just common sense and justice.

There is and probably could be no all-inclusive definition of due process of law. Broadly the Fourteenth Amendment limits state legislatures to enactments which do not offend fundamental principles of right, reason and justice. *Truax* v. *Cor-*

rigan, 257 U. S., 312, 324, and *Endicott* v. *Encyclopedia Press*, 266 U. S., 285.

The beauty about "due process of law" is that it is not fixed and immutable but changes with the times. The automobile has revolutionized many things—the Nation's life itself. How they are run is well known as was thus recently described by the Supreme Court of Tennessee in *Southern Railway* v. *Simpson*, 149 Tenn., 458, 462, 261 S. W., 677, 678:

> "A murderous contempt for all regulations ordained to control their movements is too common, among those operating motor vehicles, to justify the court in permitting such lawlessness to be rewarded, unless the statutes so compel."

A rule may have been very well for "horse and buggy days" but absurd today. *Euclid* v. *Ambler Realty Co.*, 272 U. S., 365, 386-7. Pretermitting other questions, in the days before good roads and automobiles, it was one thing to require a railroad to merely explain a collision with a horse and buggy—a mere rule of evidence; but, today, to say that every time a train hits an automobile it is presumptively guilty of every charge an ingenious pleader can imagine is quite another.

The Georgia Supreme Court made no attempt to discuss the various grounds of unconstitution-

ality urged upon it but merely quoted at length from two decisions of this honorable Court, neither of which touch the questions we raise nor contain anything militating against our position. (R., 34-39.)

(d) Hawes v. Georgia, 258 U. S. 1.

Hawes was indicted under a Georgia prohibition act making it unlawful to manufacture intoxicating liquors. One section of this act made proof of the existence of distilling apparatus on the premises *prima facie* evidence that the person "in actual possession" of such premises had knowledge of the same. A still, boxes and barrels were found in three hundred yards of Hawes' house. An old path led from the premises to the still. Hawes made no attempt to deny or explain. He was found guilty. It was claimed that the presumptive section of the Georgia act was invalid but this court held otherwise, saying:

> "Distilling spirits is not an ordinary incident of a farm and in a prohibition State has illicit character and purpose, and certainly is not so silent and obscure in use that one who rented a farm upon which it was or had been conducted would probably be ignorant of it. On the contrary, it may be presumed that one on such a farm or one who occupies it will know what there is upon it. It is not arbitrary for the State to act upon the presump-

> tion and erect it into evidence of knowledge; not peremptory, of course, but subject to explanation, and affording the means of explanation. Hawes had such means. An explanatory statement was open to him with a detail of the circumstances of his acquisition of the place, and he availed himself of it. He could have called others to testify to the circumstances of his acquisition, for the circumstances were not so isolated or secret as not to have been known to others." (Pages 4-5.)

The presumption so sustained was neither unreasonable nor conclusive. There was a rational relation between the existence of the still on Hawes' place near his house connected by an old path and his knowledge of its presence.

How different the case at bar. Plaintiff proved a collision between the truck her husband was driving and one of the Railway's trains—the trial judge thereupon charged on authority of the statute under attack in effect, among other things, that proof of the fact of collision and Henderson's death justified the presumption, first, that the engineer after seeing the truck driver's dangerous predicament deliberately speeded up his train, and second, that the engineer was practically blind.

There is no rational connection between the proven fact and the presumed fact. It is common

knowledge that railroads do not entrust locomotives to men who cannot see—the mere wearing of glasses is no evidence of practical blindness. Likewise it is common knowledge that engineers put on brakes, not more steam, when automobiles get on the tracks. The Hawes case is no authority for the validity of the Georgia statute now under attack.

(e) Mobile, Jackson and Kansas City Ry. v. Turnipseed, 219 U. S. 35.

Hicks was an employee of the railroad and was killed while on duty. His administrator, Turnipseed, sued his employer in a Mississippi state court. Plaintiff won below and in the Supreme Court of Mississippi. The trial judge applied section 1985 of the Mississippi Code which is as follows:

> "Injury to Persons or Property by Railroads *prima facie* Evidence of Want of Skill, etc. In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies."

The statute was attacked on the ground that it violated the due process and equality clauses of the Fourteenth Amendment.

This Court sustained the act on the ground that (1) it constituted a mere rule of evidence not a rule of liability (see *Easterling Lumber Co.* v. *Pierce*, 235 U. S., 380, 382, specifically so holding;) (2) was limited to cases where either an employee or passenger sued—in other words, it applies only where plaintiff and defendant railroad are related by contract; (3) created a mere rebuttable inference relating to a matter peculiarly within the railroad's knowledge; (4) as soon as proof was introduced the inference ended—in other words, the presumption could not be weighed against actual testimony; (5) such a rebuttable and reasonable inference or presumption was valid when there was "some rational connection between the fact proved and the ultimate fact presumed . . ."

The Supreme Court of Mississippi in construing this statute in *Columbus & G. Ry.* v. *Fondren*, 145 Miss., 679, 110 Southern Reporter, 365, said:

> "We think the court erred in granting the instructions for plaintiff on the *prima facie* negligence statute, for which error the judgment must be reversed. As stated, numerous witnesses testified as to how the injury occurred; and, while there was a conflict in the testimony as to how it happened, the jury had before it the testimony fully explaining how the injury occurred, and *it was the duty of the jury to decide the issue of negligence or*

not from the proof in the case, and not from the presumption of negligence under the prima facie statute. These instructions should not have been given, and we do not find any other instructions on this phase of the case which would cure the error or render the erroneous instructions harmless in the case.

"We see no use in again discussing this *prima facie* negligence statute. The rule laid down in *G. M. & N. R. R. Co.* v. *Brown*, 138 Miss., 39, 102 So., 855; *Davis* v. *Temple*, 129 Miss., 6, 91 So., 689; *G. M. & N. R. R. Co.* v. *Arrington* (Miss.), 107 So., 378; *Davis* v. *Elzey*, 126 Miss., 789, 88 So., 630, 89 So., 666; *A. & V. Ry. Co.* v. *Thornhill*, 106 Miss., 387, 63 So., 674; *Ala. Gr. So. R. R. Co.* v. *Daniell*, 108 Miss., 358, 66 So., 732; *Owen* v. *I. C. R. R. Co.*, 77 Miss., 142, 24 So., 899—seems to us to be clear and definite, and must be followed in such cases. In *G. M. & N. R. R. Co.* v. *Arrington, supra*, in which the question of whether or not the court erred in granting a *prima facie* negligence instruction where the testimony explained how the injury occurred, the court said:

" 'This instruction ought not to have been given because the testimony in the case sufficiently explains every material fact connected with the infliction of the injury, and clearly shows how the injury occurred; therefore, it was error to tell the jury that "the burden is upon the defendant to 'exculpate' itself from

any and all negligence" . . . But we shall say just one more thing in connection with this statute, and that is, that after it has served its purpose in the trial by compelling the railroad (company) to explain how the injury occurred, then the question of negligence or not is to be decided from the facts in the case.'

"And again, in the Brown case, *supra*, the court said:

" 'Where the facts are in evidence, the jury must determine the negligence or lack of negligence from the evidence and not from the statute.'

"Where the defendant's version of the facts is disputed by the plaintiff, then the duty devolves upon the jury to determine the truthfulness of the testimony; they cannot sidestep that duty by invoking the statute in such cases.

"In view of the conclusion reached, the judgment of the lower court is reversed and the case remanded."

Again, in *Gulf, etc. R. R.* v. *Brown*, 138 Miss., 39, 102 Southern Reporter, 855, the court said:

"In our opinion it was improper to invoke the *prima facie* statute as was done in instruction No. 6 for the plaintiff set out above. It has often been held by this Court that where

the facts are in evidence, *the jury must determine the negligence or lack of negligence from the evidence and not from the statute.* It was especially improper and harmful for the court to instruct the jury that the facts so proven must exonerate the railroad company from blame, otherwise the railroad company is not relieved from liability and the presumption controls."

How differently the Mississippi courts construed the Mississippi Prima Facie Act from the construction by the Georgia courts of the Georgia presumptive statute under attack.

This Mississippi Prima Facie Act, as construed by the Mississippi courts and this Court, is a mere rule of evidence obtaining only when the plaintiff and defendant are related by privity of contract and merely requires a railroad to explain matters peculiarly within its knowledge. The inference or presumption created by this Mississippi statute may not be weighed against substantive evidence. A jury must rest their verdict exclusively on the testimony—laying to one side the statute.

Burden of proof is a matter of substance and not a mere rule of evidence. *New Orleans & Northeastern R. R.* v. *Harris, Admr.*, 247 U. S., 367, 372. It is one thing to provide by statute a

reasonable rule of evidence as is done by the Mississippi Prima Facie Act; quite another to permit unproven averments, having no rational connection with those proven, to constitute substantive evidence and be the basis of a verdict and judgment as is done by the Georgia act under attack. This is not due process of law.

(f) Proof of proximate cause is indispensable to due process of law.

It is elemental that a party defendant may not be mulcted in damages merely because of negligence. The negligent act must cause, in whole or in part, the injury complained of. In the case at bar all plaintiff had to do was to prove the fact of collision and damage. Then unless the Railway disproved the many fanciful and absurd averments of plaintiff's petition, some of which plaintiff did not even try to prove, a verdict against the Railway was justified by the statute.

Proximate cause is not a fact which is subject to inference or presumption. It must be proved and so proved as to take the cause of the accident out of "the realm of speculation and conjecture." *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U. S., 472, 478. Under this Georgia statute there may be a verdict against a railroad without any proof as to proximate cause. (See the Thompson case, page 19, *supra.*)

(g) Conclusion.

It is respectfully submitted that this Georgia act as construed by the Georgia courts offends the due process of law clause of the Fourteenth Amendment because,

1. It violates that fundamental principle of Anglo-Saxon jurisprudence that *allegata* and *probata* must correspond. *Southern Railway* v. *King*, 217 U. S., 524, 536; *United States* v. *Commissioner of Immigration*, 273 U. S., 103, 106. In the case at bar the jury were permitted to consider, in arriving at their verdict, seven averments of negligence supported by no proof.

2. Mere proof of collision without any proof of proximate cause will justify a verdict.

3. The presumption created is neither reasonable nor rebuttable. It is unreasonable because not limited by common experience or common sense. Proof of one fact will support the presumption of another fact with which it has no rational connection. It is not rebuttable because a jury may weigh this presumption against actual testimony.

4. It creates not a mere rule of evidence but a rule of liability between strangers.

This honorable Court in common with the public at large knows that the average driver of an

automobile does not stop, look and listen when approaching grade crossings (*Baltimore & Ohio* v. *Goodman*, 275 U. S., 66, 70) and constantly violates rules of the road and speed restrictions (*Southern Railway* v. *Simpson*, 149 Tenn., 458, 462). Automobiles now are in universal use, not only as pleasure cars but as means of private and public transportation. They are engaged in the common carrier business just as railroads. When one of these trucks, as in the instant case, dashes onto a railroad crossing and a collision occurs, there is neither justice nor common sense in presuming that the fault lay with the railroad. Common experience of mankind does not support such a presumption. We all know—it is common knowledge—that most collisions are due to the failure of the driver to stop, look or listen. To go further and hold that in such a case a legislature may enact a statute which permits the automobile driver to aver any number of different grounds of negligence and then merely prove the single fact of collision and recover on such unproven averments unless affirmatively disproved by the defendant—the jury being permitted to consider the unproven averments as substantive evidence as against actual testimony of the defendant—is so palpably arbitrary and unreasonable as to offend the fundamental conception of justice brought into our organic law by the Fourteenth Amendment.

THE GEORGIA STATUTE DENIES RAILROADS THE EQUAL PROTECTION OF THE LAWS.

(a) Unproven averments of negligence are as a matter of law dropped from consideration by a jury except in collision cases against railroads.

The general rule in Georgia requires a plaintiff to allege the negligence on account of which recovery is sought and then prove it. (See cases cited pages 20-21, *supra.*)

This is not required in the single class of cases where a railroad is the party defendant and the accident results from train operations.

In *Payne, Agent* v. *Wells*, 28 Ga. App., 29, 109 S. E., 926, the syllabus by the court is as follows:

> "*The general rule*, that it is error for the trial judge to state to the jury an allegation of negligence contained in the plaintiff's petition, where the allegation is not sustained by any evidence, *does not apply in an action for damages against a railroad company for a homicide*, where the evidence shows that the homicide was caused by the running of the defendant's cars, for in such a case the presumption arises that the defendant was negligent in each and every particular as alleged in the plaintiff's declaration, and primarily this presumption is sufficient to prove the negligence alleged. In such a case it is not error

> for the court, in charging the jury, to refer to all the acts of negligence alleged, although the allegations as to some of them may not be sustained by any evidence, and may even be disproved by undisputed evidence."

In other words, there is one law in Georgia for railroads and another for all other *tort feasors.*

In *Truax* v. *Corrigan*, 257 U. S., 312, this Court held that the requirements of the Fourteenth Amendment that no state should deny to any person the equal protection of the laws was aimed at "undue favor and individual or class privilege on the one hand and at hostile discrimination or the oppression of inequality on the other . . . Indeed, protection is not protection unless it does so."

In that case it was held that a state statute making a distinction "between the ex-employees and other *tort feasors* in the matter of remedies" violates the equality clause.

In every other case in Georgia a plaintiff abandons as a matter of law unproven averments of fact in his petition or declaration. Only in the case of a railroad may a plaintiff aver a fact, decline to even try to prove it and recover a judgment thereon. Only in suits against railroads may the unproven allegation in a pleading be considered actual evidence of the truth thereof.

The object and intent of this Georgia statute as construed by the Georgia courts is not reasonable or fair but constitutes invidious discrimination without any grounds in reason or equity therefor against railroads.

When a great automobile truck, almost as large as a box car, dashes on to a railroad crossing, the driver neither stopping, nor looking nor listening and a collision occurs, the driver suing in Georgia may aver numerous and sundry grounds of negligence in his petition or declaration and then prove the mere fact of collision and damage and this without more will warrant a verdict and judgment. Whereas, the railroad if it sues the truck driver must affirmatively prove by evidence the negligence averred in its petition and that it was the proximate cause of the collision. The Georgia rule is one that does not work both ways. It is respectfully submitted that it is unfair and constitutes an unjust and invidious discrimination against railroads and therefore violates the equal protection of the laws clause of the Fourteenth Amendment.

(b) Proof of proximate cause is required in all tort cases except when a railroad is the defendant in a collision case.

It is the general rule in Georgia that a party plaintiff suing in *tort* must prove that some averment in his declaration caused or contributed to the accident complained of. (See cases on page 21, *supra.*) This reasonable rule seems to be uni-

versal except when a railroad is sued in a collision case. (See cases, page 21, *supra.*)

In the case at bar the trial judge specifically authorized a verdict against the Railway upon mere proof of the fact of collision and damage unless the Railway affirmatively disproved all the averments of negligence in plaintiff's declaration, proven or unproven. *Proximate cause was ignored.*

It is respectfully submitted that, while the classification of railroads for many purposes is justified, to take them out of the general rule requiring proof of proximate cause in actions *ex delicto* can be based on no rational grounds. It is simply invidious discrimination. *Truax* v.. *Corrigan*, 257 U. S., 312, 331-334, 335-340.

It is respectfully submitted that Section 2780 of the 1910 Georgia Code as constructed by the Georgia courts and applied in the case at bar is unconstitutional and that the charge of the trial judge enforcing it against the Railway was erroneous.

Respectfully submitted,

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February 9, 1929.

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A number of states have presumption statutes similar to that of Georgia in railroad cases, and it is universally held that it is for the state to say, under all such statutes, how far the burden of proof may be changed and the effect of the presumption, the only requirement under the due process clause being that the presumption be not arbitrary and that it be not conclusive 31-33

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Supreme Court of the United States

OCTOBER TERM, 1928

No. 519

WESTERN & ATLANTIC RAILROAD,
Appellant,

VERSUS

MRS. MARY E. HENDERSON,

AND

MARYLAND CASUALTY COMPANY,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR MRS. MARY E. HENDERSON AND MARYLAND CASUALTY COMPANY, APPELLEES.

The opinion of the Supreme Court of Georgia, which is appealed from, is found in the Record, beginning on page 23, and is reported in 144 S. E., p. 905, pamphlet No. 12. It has not yet been published in the Georgia official reports.

The opinion of the Court of Appeals of Georgia, which was affirmed by the Supreme Court of Georgia,

is reported in 36 Ga. App. on p. 679, and is found in the record on p. 174.

STATEMENT OF FACTS

This suit was brought in the Superior Court of Whitfield County, Georgia, by Mrs. Mary E. Henderson against the Western & Atlantic Railroad, for the death of the plaintiff's husband.

The decedent, J. C. Henderson, was killed at a public grade crossing over the defendant's tracks by a collision between a train of the defendant and the truck which the decedent, Henderson, was driving over the crossing.

Negligence was alleged as to the condition of the grade crossing, it being alleged that it was unsafe for vehicles to cross over and that the defendant had removed the ballast from the crossing before Henderson's death, and that the removal of the ballast left the crossties exposed and the rails projecting upward several inches, which condition caused the truck to stall, and, while so stalled, it was run upon by the train, and Henderson was killed.

Negligence was also alleged in the operation of the train, it being alleged that the train was run at a negligent speed; that the engineer failed to give certain signals required by the statutes of Georgia upon approaching grade crossings; that the engineer failed to keep a proper lookout and failed to exercise due care in approaching the crossing; and that the engineer also failed to check the speed of the train on approaching the crossing, or to make any effort to do so, but negligently accelerated the same.

By amendment, it was alleged that the engineer was near-sighted, and, in fact, about blind in one eye at the time of the collision.

Upon the first appeal of the case to the Court of Appeals of Georgia, the Court of Appeals, in 35 Ga. App. on p. 354, had this to say:

> "The evidence is in conflict, but we can not say that the jury were not authorized to find from the evidence a verdict in favor of the plaintiff; and if the sole assignment of error were as to the sufficiency of the evidence, the case would fall within the rule that, where there is some evidence to authorize a verdict approved by the trial judge, this Court is by law powerless to interfere."

The Court, however, upon this first appeal sent the case back because of an error in the charge of the judge to the jury.

Upon the last appeal, which is reported in 36 Ga. App. 679, the Court of Appeals held:

> "Under the facts stated above, the previous ruling of this Court that the plaintiff was entitled to a recovery has become the law of the case, and that ruling must be and is adhered to."

The Supreme Court of Georgia granted a writ of certiorari to the Court of Appeals of Georgia to test the constitutionality of what is known as the Georgia presumption statute, contained in section 2780 of the present Code of Georgia of 1910, to-wit:

> "A railroad company shall be liable for any damage done to persons, stock, or other property

by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The statute was held constitutional by the Supreme Court of Georgia, and the railroad appealed to this Court.

HISTORY OF SECTION 2780 OF THE GEORGIA CODE OF 1910.

This statute has been the law of Georgia for over sixty-six years. It was first enacted as section 2978 of the Georgia Code of 1862, its language then being identical with the language of all subsequent Codes adopted by the legislature, including the last Code of 1910.

HOW THE QUESTION AS TO THE CONSTITUTIONALITY OF THE PRESUMPTION STATUTE ARISES.

Code section 2780 of the Code was given in charge by the trial judge to the jury, and in the motion for new trial the appellant made the attack upon the charge of the court and the statute upon which it was based, claiming that the statute violated the Fourteenth Amendment of the Constitution of the United States, and, beginning on page 9 of appellant's brief, it is claimed that section 2780 violates the due process clause of the Fourteenth Amendment to the Federal Constitution in the particulars set out on page 9, and that it violates the equal protection of the laws clause

of the Fourteenth Amendment as set out on page 10 of the brief, and it is claimed that the charge of the court, which interpreted to the jury the statute as construed by the Georgia courts, was erroneous for the same reasons for which the statute was attacked as unconstitutional.

THE MEANING OF THE GEORGIA PRESUMPTION STATUTE AS CONSTRUED BY THE GEORGIA COURTS IS HERE SHOWN. IT DOES NOT ESTABLISH A RULE OF LIABILITY, BUT IS A RULE OF EVIDENCE DETERMINING WHAT PROOF SHALL MAKE OUT A PRIMA FACIE CASE, AND MAY ALSO BE CONSTRUED AS REGULATING THE BURDEN OF PROOF. THE RAILROAD IS ALLOWED THE FULLEST LATITUDE IN OVERCOMING THE PRESUMPTION AND IN SHOWING THE REAL FACTS, AND THE CASE IS DECIDED BY THE PREPONDERANCE OF THE TESTIMONY. IF THE UNDISPUTED EVIDENCE, WITH ALL REASONABLE DEDUCTIONS TO BE DRAWN THEREFROM, OVERCOMES THE PRESUMPTION, THE JUDGE MAY NONSUIT THE CASE, IF THIS APPEARS FROM THE PLAINTIFF'S EVIDENCE, OR MAY DIRECT A VERDICT FOR THE DEFENDANT IF IT APPEARS FROM THE WHOLE EVIDENCE, OR, IF THE FACTS ALLEGED IN THE PETITION FAIL TO SHOW NEGLIGENCE, OR INJURY AS THE PROXIMATE RESULT OF THE NEGLIGENCE, THE CASE WILL BE DISMISSED UPON DEMURRER. NO NEGLIGENCE PRE-

SUMED WHERE NO DUTY OF CARE OWING INJURED PERSON.

It will be observed that this section makes the railroad liable for the damage done by the running of the locomotives, cars, or other machinery of the company, or for damage done by any person in the employment and service of the company, "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The State of Georgia has by statute the comparative negligence doctrine, somewhat like the doctrine of comparative negligence under the Federal Employer's Liability Act.

By section 4426 of the Code, it is provided:

> "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

In one of the earliest cases on this subject, which is the case of Central R. R. Co. vs. Brinson, 64 Ga., p. 478, the Supreme Court of Georgia said:

> "Thus it will be seen that, although the presumption is always against the company, yet it may rebut that presumption and relieve itself of damages by showing that its agents have exercised all ordinary and reasonable care and diligence to avoid the injury; or it may show that the damage was caused by the plaintiff's own negligence; or it

may further show that the plaintiff, by ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence. Upon either of these grounds the defendant may rest his defense.

"But these rules of law will not cover the facts of every case, for it may be that both the plaintiff and the agents of defendant are at fault, and when they are, then, whilst damages may be recovered, they are to be diminished by the jury in proportion to the default attributable to the plaintiff for his want of ordinary care in avoiding the injury to himself."

The Supreme Court of Georgia has limited the presumption statute to cases where some duty is owing to the injured person, such as the duty towards travelers on grade crossings, the duty towards persons on adjoining highways, the duty towards passengers, or the duty towards any other person occupying any position with reference to the railroad which requires the use of ordinary care.

Where the injured person is at a place and is injured under such circumstances as that no duty of care is owing him by the railroad company, such as a trespasser upon the track, no presumption of negligence arises. In the case of Holland vs. Sparks, 92 Ga. on page 754, the court used the following language:

"Relatively to one to whom no diligence whatever is due, there can, in legal contemplation, be no negligence at all in causing him a personal injury. Where some degree of diligence is due to another, with reference to his personal safety, failure to observe that degree of diligence will be negligence as to that person. In other words, negli-

gence, relatively to the safety of any particular person, is the breach of some diligence due to him. When an action is brought for a personal injury, caused by the running of a locomotive or car of a railroad company, the presumption of negligence does not arise against the company unless it appears that, at the time of the injury, there was due from the company to the person injured some degree of diligence to prevent that injury. The burden of proving it owed no diligence is not upon the company, but the plaintiff must show that, relatively to the safety of the person injured, some diligence was due by the company. As soon as he does this, the presumption immediately arises that the company's negligence caused the injury; and in order to escape liability, it must rebut that presumption by showing the observance on its part of such diligence as was due. After much deliberation, we are satisfied that nothing, even in the broad language of section 3033 of the Code (of 1882, which is the same section now under consideration as 2780 in the Code of 1910), relieves the plaintiff, in cases of this character, from the necessity of showing that a duty of diligence, such as we have mentioned, existed; or imposes upon a railroad company the burden of proving, negatively, the contrary. A presumption of negligence is neither more nor less than a presumption that there was a breach of diligence. Such a breach could not, of course, be presumed in a case where it was affirmatively proved, as a matter of fact, that no diligence at all was due. If, therefore, it is incumbent on the plaintiff to make the duty of diligence, relatively to the person injured, appear, and he fails to do so, the case must stand upon the same footing, for as to what a plaintiff is required to show, 'that which does not appear does not exist.'

"When the presumption of negligence has once been raised against a railroad company under the section above cited, and the company satisfactorily shows that its agents exercised all ordinary and reasonable care and diligence to prevent the particular injury for which the action was brought, it establishes its observance of the diligence due by it. What will constitute the amount or kind of diligence which will be required as 'ordinary and reasonable' must necessarily vary under different circumstances. It cannot be measured or ascertained by any fixed and inflexible standard, because the words just quoted are themselves relative terms, and what, under some conditions, would be ordinary and reasonable diligence might, under other conditions, amount to even gross negligence. For instance, for most purposes, running a passenger train through the country at a rate of twenty-five miles an hour would be safe, prudent and proper, while to run the same train at this rate over a crossing in a crowded city would amount to wantonness. The measure of diligence due, therefore, by a railroad company to any person is a relative one, and what is or is not due diligence must be arrived at in every case with reference to the surrounding circumstances and the relations which, for the time being, the company and the person in question occupied towards each other."

In the case just quoted, the deceased person was walking near the track of the railway company on its right of way, not at a public crossing and at a point where there was no path or roadway in customary use by pedestrians. When the defendant's train passed him, some of the cars were derailed and were hurled a distance of twenty feet away from the rail to where the deceased was, and killed him. It was held that no duty was owing to the deceased at this point, and that,

therefore, no presumption arose. The court differentiated the case from one where a person was injured on a crossing or some other place where he had a right to be and where the company should have expected his presence, and, in reference to such places, the court, on page 758 of the opinion, used the following language:

> "In running its trains, the company must necessarily expect to find people at road crossings, or at other points where they have a right to be or to travel, and hence it becomes its duty to regulate the speed of trains at such places as to avoid inflicting injuries."

In the case of Southern Ry. vs. Thompson, 129 Ga. 367, which was a case of injury to property by fire communicated by sparks from a locomotive, the court, in dealing with the presumption of negligence, used this language on page 370:

> "If the presumption arises, it must be rebutted by evidence; but this may be done by evidence drawn from the plaintiff or his witnesses, as well as by that introduced by the defendant."

In the case of Atlantic Coast Line R. R. Co. vs. Taylor, 125 Ga. 454, the court, on page 455, used the following language:

> "Error is assigned upon the following extract from the charge: 'It is incumbent upon the company, when the injury is shown to have been inflicted by it, to overcome that presumption by the introduction of evidence for your consideration.' This was an inaccurate statement of the law. The defendant may rely upon the evidence introduced by the plaintiff to overcome the presumption of negligence, if it tends to have that effect."

The presumption under the statute is only prima facie, and where the defendant, by uncontradicted evidence by witnesses who know the facts with certainty, rebuts that presumption, a verdict against the railroad is illegal and will be set aside, as see the case of Savannah, Florida & Western Ry. Co. vs. McConnell, 94 Ga. 352, where the court used the following language:

> "The plaintiff depended for a recovery solely upon the presumption of negligence which the law raises against a railway company. That the animals were killed by the defendant's train was admitted; but by the evidence of two witnesses for the company—the engineer and the fireman—who knew with absolute certainty the facts of the transaction, it was conclusively shown that the company and its servants in charge of the train were free from all negligence in the premises. So the legal presumption against the company was fully overcome."

The effect of the presumption of negligence is to establish the plaintiff's case prima facie, and it is not incumbent upon the defendant to defeat the presumption of negligence by undisputed evidence, but it can defeat that presumption by a mere preponderance of the testimony. In other words, the initial burden of proving the injury is upon the plaintiff to prove that injury by a preponderance of the evidence, but when that initial proof of injury is made, then the defendant is presumed to be negligent, and the burden is on the defendant to establish its freedom from negligence by a preponderance of the evidence. Of course, it is for a jury to say where the preponderance lies. The defendant may put up only one witness, but he may be

more credible and trustworthy than a dozen on the other side, and that may furnish the preponderance.

In the case of Murphy vs. Georgia, &c. Co., 146 Ga., on page 299 the court used the following language:

> "There was no error in charging, under the facts of this case, that 'when personal injury is shown to have been done by the cars of a railroad company, the presumption is against the company, but it may defeat a recovery by establishing, by a preponderance of the evidence, either of the following defenses: that its agents have exercised all ordinary care and reasonable diligence to avoid the injury; that the damage was caused by the negligence of the person injured; that he consented to it; or that the person injured, by the use of ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence.'"

If, upon the plaintiff's evidence, it appears that the injury could not have occurred had the plaintiff exercised ordinary care, there is no presumption even of negligence, though the injury is caused by the running of a train, and a judgment of non-suit is proper. Parish vs. Western & Atlantic R. R. Co., 102 Ga. 285.

Even though the injury occurs at a public crossing, still, if the plaintiff's evidence shows that the plaintiff, by the use of ordinary care, could have avoided the consequences to himself of the defendant's negligence, if any, the plaintiff's case would be non-suited. In this case, it appeared that the injured person went to sleep on the track at a public crossing. Raden vs. Georgia R. R., 78 Ga. 47.

Similar rulings were made in Southwestern R. R. vs. Hankerson, 61 Ga. 114, where the plaintiff became drunk or insensible on the railroad track, and in Wilds vs. Brunswick & Western R. R., 82 Ga. 667, where the injured person was walking upon a track at night, not at a public crossing. The court said in this last case:

> "The homicide occurred at night, several hundred yards from any public crossing; and the only reason why there was any such unfortunate calamity was, that the company and the deceased were both attempting to use the track at the same time. The company had a right to its use; the deceased had none. There is no explanation whatever as to why he did not avoid the consequences of the company's negligence. That he could have done so by exercising the care of a prudent person is manifest."

The trial judge in the case at bar fully recognized the construction of this statute, as is shown by the Supreme Court decisions we have quoted. In the particular charge which is complained of in the present appeal, after telling the jury that when the injury occurred by the operation of a train, the presumption arises that the railroad company was negligent in the particulars specified in the petition, the judge said:

> "and the burden thereupon shifts to the railroad company to show that its employes exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent," &c. See page 165 of the Record.

Further on in the charge, as appears from pages 168 and 169 of the Record, the judge said:

"In other words, gentlemen of the jury, before finding for plaintiff, you must find from the evidence that one or more of the acts or omissions, which are in the petition of the plaintiff alleged as negligence, occurred; that such act or omission was a negligent act or omission; that it resulted in the death of the plaintiff's husband, and that he could not have, by the exercise of ordinary care for his own safety, avoided the consequences to himself of such negligence."

Further on page 169, the judge charged:

"If the defendant has shown that it and its employes exercised ordinary care and diligence in the particulars wherein negligence is alleged, the plaintiff cannot recover."

On page 171 the court charged as follows:

"The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualification already given you, that, when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition, and the burden thereupon shifts to the defendant company to show that its employes exercised ordinary care and diligence in such particulars.

"What is meant by the preponderance of the evidence is that superior weight of the evidence upon the issue involved, which, while not sufficient to wholly free the mind from a reasonable doubt, is yet sufficient to incline the mind of a reasonable and impartial person to one side of the issue rather than the other.

"In determining what weight you will attach to

> the testimony of any witness, you may look at his or her appearance on the stand, take into consideration their manner of testifying, their interest or want of interest in the case, their feeling, prejudice or bias, if anything of the sort has been made to appear, together with their opportunity of knowing the facts about which they testify, and their inducement, if any, to swear falsely."

The judge then proceeded to give various other rules for determining the credibility of the witnesses and the weight of the testimony.

THE PRESUMPTION STATUTE IN GEORGIA PRESENTS ONLY A RULE OF EVIDENCE AND A REGULATION OF THE BURDEN OF PROOF, AND DOES NOT DISPENSE WITH PROPER PLEADINGS. LAW AS TO PLEADINGS IN GEORGIA REQUIRES THE AVERMENTS OF NEGLIGENCE TO BE DISTINCTLY SET FORTH.

The Georgia presumption statute does not dispense with proper pleadings in negligence cases, in which proper averments of negligence are required to be made. South Georgia Ry. Co. vs. Ryals, 123 Ga. 330, and the body of the opinion on page 332.

The rule in Georgia requires that the plaintiff, in his petition, shall set forth the facts upon which his cause of action is based plainly and distinctly and in numbered paragraphs. Section 5538 of the Georgia Code of 1910 reads as follows:

> "All suits in the Superior Court for legal or equitable relief, or both, shall be by petition to the court, signed by the plaintiff or his counsel, plainly,

> fully, and distinctly setting forth his charge, ground of complaint and demand, and the names of the persons against whom process is prayed."

Section 5539 of the Georgia Code of 1910 reads as follows:

> "All such petitions shall set forth the cause of action in orderly and distinct paragraphs, numbered consecutively; and any averment distinctly and plainly made therein, which is not denied by the defendant's answer, shall be taken as prima facie true, unless the defendant states in his answer that he can neither admit nor deny such averment because of the want of sufficient information."

Under the Georgia requirements as to pleading, which in a spirit of fair play to the defendant require the plaintiff to set forth his cause of action fully, a plaintiff in a personal injury suit against a railroad is not relieved by the presumption statute from setting forth the specific acts of negligence which caused the injury. In other words, the defendant is still entitled to know the acts of negligence relied on, even though they may be made out prima facie by presumption. See Blackstone vs. Central, &c. R. R., 105 Ga. 380; Russell vs. Central, &c. R. R., 119 Ga. 705; Seaboard, &c. R. R. vs. Pierce, 120 Ga. 230.

This rule is in favor of the defendant and limits the effect of the presumption. The Georgia court was reconciling the two rules, one of which raised a presumption and the other of which allowed a plaintiff to recover only by specifying certain acts of negligence. In order to reconcile these two rules, the presumption raised against the railroad company must be held to be

limited to the averments in the petition. See Central, &c. R. R. vs. Weathers, 120 Ga. 475.

STATE STATUTE COMES BEFORE SUPREME COURT OF THE UNITED STATES WITH THE CONSTRUCTION UPON IT WHICH THE STATE COURTS HAVE PLACED UPON IT, SO FAR AS TESTING ITS CONSTITUTIONALITY IS CONCERNED.

It is familiar law that the construction of a state statute by the state court governs, where the constitutionality of that statute is up for consideration. See the following cases: Gatewood vs. North Carolina, 203 U. S. 531; Board of Education vs. Illinois, 203 U. S. 553; Smiley vs. Kansas, 196 U. S. 447.

APPELLANT'S CONTENTION THAT GEORGIA PRESUMPTION STATUTE CREATES A RULE OF LIABILITY UNDER CERTAIN GEORGIA AUTHORITIES, ANSWERED. THE GEORGIA AUTHORITIES RELIED ON BY DEFENDANT ARE DISCUSSED, AND IT IS SHOWN THEY DO NOT OPERATE AGAINST THE MEANING OF THE STATUTE, AS HEREINBEFORE CONTENDED FOR IN THIS BRIEF.

Appellant quotes the case of Central, &c. Ry. Co. vs. Hartley, 25 Ga. App. 110, on page 13 of the brief, as showing that when an injury by the running of cars occurs, a presumption of liability arose against the defendant, "unless the company should make it appear that its agents had exercised all ordinary and reason-

able care and diligence, the presumption in all cases being against the company."

This is merely repeating the language of the statute, and does not in any way detract from the proposition that it is only a presumption which is dealt with, and a presumption of liability amounts to no more than a presumption of negligence, because the negligence would create the liability and it is a mere question of phraseology, without any difference in meaning.

The case of Western & Atlantic R. R. vs. Dobbs, 36 Ga. App. 516, quoted on page 14 of appellant's brief holds that where damage is done by a railroad company, the company is liable unless it makes it appear that their agents have exercised ordinary care and diligence, &c., and that "there arises, upon proof of injury to a person by a servant of a railroad company, not only a presumption of negligence of the company, but a presumption that the company's negligence was the proximate cause of the injury."

This only amounts to saying that a presumption of negligence amounts to negligence, according to the legal definition of that term, negligence being an utterly irrelevant fact unless it proximately produces the injury. In other words, the presumption goes to the extent of presuming negligence causing the injury. There is nothing remarkable about this. The presumption would amount to nothing unless the negligence was the cause of the injury, as we have hereinbefore stated.

If, from the facts stated in the petition or appearing in the evidence, the negligence is unrelated to the in-

jury, the court can strike the averment from the petition or the evidence from the record.

The case of Central &c. Ry. Co. vs. Barnett, 35 Ga. App. 528, quoted on pages 15 and 16 of the brief, merely reiterates the proposition that when the plaintiff carries the burden of proving the injury by the operation of the defendant's cars, that the defendant has the burden on it of showing by a preponderance of the evidence its defense.

The case of Payne, Agent vs. Wells, 28 Ga. App. 29 is quoted on page 17 of defendant's brief, and holds, in substance, that the presumption against railroads arises from injury by the running of the cars, and that the presumption is that the defendant was negligent in the particulars alleged in the petition, and that it is not error for the court, in stating the issues to the jury in his charge, to refer to all of the acts of negligence charged, although some of them may not be sustained by the evidence and may be even disproved by undisputed evidence.

To understand the full meaning of the Wells decision just quoted, it is necessary to explain the law of Georgia in reference to the way negligence cases are tried and submitted to the jury.

In Georgia, the judge is prohibited from expressing any opinion upon what has, or has not, been proved, and it is reversible error to do so, as see Code of Georgia of 1910, section 4863, which provides:

> "It is error for any or either of the judges of the superior courts of this state, in any case, whether civil or criminal, or in equity, during its

progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused," &c.

The section then proceeds to provide that for any such violation, the judgment below shall be reversed.

When a case is submitted to the jury on an issue of negligence, whether against a railroad or any other person, the question of whether the particular facts constitute negligence or not must be left to the jury by the judge in his general charge.

In Harris vs. Central R. R., 78 Ga. 525, the court, on pages 535 and 536 of the decision, held that what ordinary care required on part of a plaintiff or a railroad under the particular facts of the case were questions for the jury, the court saying on page 536:

"These were all questions for the jury, under the special circumstances. They are questions of fact rather than of law, because diligence has to be determined in view of the conditions, the special conditions, existing at the time the conduct under investigation took place; and the standard of decision for ordinary diligence is the conduct of a man of ordinary prudence under like circumstances. That standard is supposed to be in the minds of the jury; and it is the standard in the minds of the jury with which the conduct involved in the particular case is to be compared. That same standard may be in the mind of the judge, and he may be more competent to make the comparison; yet the law does not permit him to make it. He has no more to do with it than if he had no standard at all. He has no more to do with the determination of a question of diligence in a particular case than if he did not know and could not find out what would be the conduct

> of a man of ordinary prudence in such circumstances. He must simply refer it to the jury. He must tell them what the standard is; that is, give the description of it which the law gives."

Further on, the court, after giving the definitions of slight, ordinary and extraordinary diligence which the judge must give the jury, closed the opinion with these words:

> "But beyond this he cannot go, unless there is some statute to lead and conduct him."

If a motion, however, is made to direct a verdict or for a non-suit, then the judge must decide at least as to whether the presumption is entirely removed as to all of the averments of negligence. If the presumption is removed by the undisputed evidence as to all of the averments of negligence, then the judge can either grant a nonsuit or direct a verdict. Code section 5926; Hall vs. Western & Atlantic R. R., 123 Ga. 213; Holland vs. Sparks, 92 Ga. 753.

Inasmuch as the judge can not express an opinion on the facts in his charge to the jury, he is much more circumscribed than he is in making a ruling on a demurrer to the petition, or on a motion for non-suit, or on a motion to direct a verdict. The presumption in a railroad case having established prima facie the negligence of the defendant in all the particulars specified in the petition, if the proof does not remove beyond dispute the effect of the presumption as to all of the averments, the judge can neither handle it by the direction of a verdict or a non-suit. The case must be submitted to the jury, and, in that event, the judge could not express the opinion to the jury that this or

that averment of negligence had been removed by the proof, according to the Wells case, but would tell the jury that if the preponderance of the evidence established that such averments of negligence were not true, that then they should not be considered. The defendant is not in any way hurt, because the jury is presumed to heed the instructions of the court and, notwithstanding the court may, in his recital of the issues in his charge, call over all of the acts of negligence alleged as mere averments in the pleadings (as was done in the Wells case, 28 Ga. App. 29), yet, when he gives the jury the rule by which they determine the issues, which is a preponderance of the evidence, the jury will readily dispose of those averments not supported by the evidence.

The appellant, in calling attention to the charge in the Wells case, does not go to the root of the whole matter, because the charge there set forth was constrained by the Georgia rule limiting the power of the judge in his charge as the Court of Appeals viewed it. The rule in Georgia on this subject is set forth in the case of Jarrett vs. Atlanta & West Point R. R. Co., 83 Ga. 347, the rule being stated in the body of the opinion on page 350, as follows:

> "2. But it is claimed by counsel for the plaintiff in error that, this being a case wherein negligence was alleged, it was the duty of the court to submit the question of negligence to the jury, and that it was unlawful for him to pass upon that question himself. That is true after the case has been submitted to the jury, but we know of no law that prohibits a trial judge from passing upon this question when it is made in a motion for nonsuit, or on demurrer to the declaration, as was

done in this case. When a motion for a nonsuit is made, or a demurrer to the declaration filed, it is the duty of the trial judge to pass upon it. If, however, the case is submitted to the jury without a motion to nonsuit, or a demurrer to the declaration, then the court must leave the question of negligence to the jury, and it is forbidden by law for the court to express any opinion upon the subject, when it is solely a question of fact. And this is the distinction between the cases cited by counsel for the plaintiff in error, which hold that negligence is a question for the jury, and those cited by counsel for defendant in error, which hold that the judge can grant a nonsuit, or sustain a demurrer upon the facts alleged in the declaration."

The case of Payne vs. Wells, 28 Ga. App. 29, merely dealt with a case where the judge, in stating the issues to the jury, referred to all the averments of negligence in the plaintiff's petition, it being claimed by the defendant that some of the allegations were not sustained by any evidence or were disproved by undisputed evidence. The court held that the presumption arose in the case and that the presumption was sufficient primarily, to prove the negligence alleged, and that in such case it was not error for the judge to refer to all of the acts of negligence, although some of them might be disproved by undisputed evidence.

The case of Georgia Railway & Electric Co. vs. Bailey, 9 Ga. App. 106, headnotes 6 and 7, holds that it is not error in the judge, in charging the jury, to refer to the acts of negligence alleged, and that no complaint can be made that the acts of negligence were not proved.

These two cases, so far as we can find, are the only

cases holding such doctrine in Georgia. They are, as before stated, predicated upon the idea that, as the trial judge can not express or intimate any opinion upon what has or has not been proved, and as questions of negligence, especially, are for the jury to find under the particular facts, the court giving only the standards of care, that the judge would be invading the jury's province if, in charging the jury, he told them that the presumption on any one averment was overcome by the evidence. This would be equivalent to holding that the witnesses testifying against the presumption were credible, and would also be equivalent to holding that the facts to which they testified showed no negligence, and would thus be an invasion of the jury's province.

Every state has its peculiarities, or, if we may say it, its eccentricities in practice, and unless these peculiarities or eccentricities invade some provision of the Constitution of the United States, the state is free to indulge in them. If the evidence, without conflict, overcomes the presumption, the court, on a motion for nonsuit, or on a motion to direct a verdict, can decide this question, as is shown by numerous cases which we have hereinbefore quoted.

If the alleged negligence in the petition shows on its face that it is not the proximate cause, or if the facts alleged to constitute negligence can by the judge be said, as matter of law, not to be negligence, because fanciful, or against the laws of nature, or otherwise, then the matter can be reached by demurrer under various decisions which we have heretofore quoted. So the defendant has a full remedy to reach every case.

The thing which differentiates the railroad case from other cases is that, in the railroad case, the presumption is established by law, which has the effect, primarily, of evidence. Once established, that the presumption, and the classification of railroads as being subject to the presumption, is valid, as does the Turnipseed and other cases in this court, and it follows that the judge, in charging the jury in a state where he is so limited, as in Georgia, must submit the sufficiency of the evidence to overcome the presumption to the jury.

However, the dictum of the Court of Appeals in the two cases of Wells and Bailey has never been held to be law by the Supreme Court of Georgia, which is our highest Appellate Court. We have two divisions of the Court of Appeals, which is an intermediate appellate court, as it is subject to review in the Supreme Court of Georgia by writ of certiorari under much the same rules as the Supreme Court of the United States grants writs of certiorari. It would be remarkable if, in the large number of cases decided, there would not occasionally be found some dictum which is not entirely in accord with the decisions of the Supreme Court.

The language in the Wells case that if there be uncontradicted evidence on some averments of negligence in the defendant's favor, that the judge may not withdraw that averment from the jury, or at least not refer to it in his statement of the issues, has never been held by the Supreme Court of Georgia, but, on the contrary, the Supreme Court and the Court of Appeals, in other cases, have held the opposite.

In the case of Savannah R. R. Co. vs. Phillips, 90 Ga. 829, the suit was against a railroad by an em-

ployee injured by a derailment alleged to be caused by negligence. The defendant requested a charge that if a certain examination appeared as to the condition of the engine, which had been alleged to have been out of repair, that then the presumption of negligence from the derailment and the injury of the plaintiff would be removed. The court held it was for the jury, and not the court, to decide what condition the engine was in, what sort of examination, if any, was made, and whether the legal presumption had been removed. The court, on page 837, held that the requested instruction grouped together certain facts, and asked the court as matter of law to declare that such facts showed due diligence on part of the railroad, and that the court rightly refused so to charge. The court then went on to say:

> "It may be that instances might arise where a certain state of facts, fully established and uncontradicted, would unequivocally be sufficient to remove the presumption of negligence raised by the law against a railroad company, and in such case it might not be erroneous or improper for the court to so instruct the jury; but this power should be exercised with extreme caution, and the court should never invade the province of the jury by deciding questions of fact which should properly be left to them for determination."

Following the suggestion of the Supreme Court in the Phillips case as to an uncontradicted state of facts, the Supreme Court, in Southern Ry. vs. Chitwood, 119 Ga. 28, held in a case for killing stock, where the plaintiff claimed the killing occurred in the day and the railroad claimed that it occurred at night and put up its engineer and fireman, who showed due diligence on

part of the night train,—that it was proper for the court to charge that if it occurred at night, there could be no recovery, as the evidence of the fireman and engineer, without contradiction, showed due diligence, and the court quoted another case in which this expression was used:

> "When an alleged fact is entirely unsupported by evidence, the judge may aid the jury by so informing them, thus relieving them of that much difficulty in reaching a correct conclusion in the case."

In the case of Shields vs. Georgia Ry. & Electric Co., 1 Ga. App. 172, the plaintiff, by an amendment to the petition (the same being a suit by a passenger against a railway company for injuries sustained by the motion of the car in starting before she had sufficient time to alight), alleged as cause of her injury, a high step, which allegation was not sustained by the evidence, and it was held that the court was not required to submit that issue to the jury, the language of the court being as follows:

> "Neither was the court required to submit such question to the jury, in view of the positive evidence by the plaintiff that such negligence had nothing at all to do with her injury. 'While a judge is forbidden to express or intimate his opinion concerning a question of fact about which there is any doubt whatever, he may with propriety say to the jury that there is no evidence to support an alleged fact, when such statement is unquestionably true'; and when an allegation is entirely unsupported by the evidence, 'the judge may aid the jury by so informing them, thus relieving them of that much difficulty in reaching a correct conclusion in the case.'"

Murphy vs. Georgia Ry. &c. Co., 146 Ga. 297, quoted on page 17 of appellant's brief; Georgia &c. Ry. vs. Thornton, 144 Ga. 381; Ellenberg vs. Southern Ry., 5 Ga. App. 389, quoted on pages 18 and 19; and Western & Atlantic R. R. vs. Thompson, 144 S. E. 831, quoted on page 19,—do not require any specific mention other than that they apply the general rule that the presumption arises, when injury occurs from the operation of the train, that the defendant is negligent in the particulars charged in the petition.

THAT THE GEORGIA PRESUMPTION AS TO INJURIES BY RAILROADS BY THE RUNNING OF THE TRAINS IS A VALID PRESUMPTION, HAS BEEN SUBSTANTIALLY HELD BY THIS COURT IN FOUR CASES, TO-WIT: MOBILE, JACKSON, &C. R. R. VS. TURNIPSEED, 219 U. S. 35; EASTERLING LUMBER CO. VS. PIERCE, 235 U. S. 380; ATCHISON &C. R. R. VS. MATTHEWS, 174 U. S. PAGE 96; AND HAWKINS VS. BLEAKLY, 243 U. S., PAGE 210.

In the Turnipseed case, 219 U. S. 35, a Mississippi statute was under consideration which created a presumption against railroads where damage occurred from the running of cars, and which reads as follows:

> "Injury to persons or property by railroads prima facie evidence of want of skill, etc.—In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to

such injury. This section shall also apply to passengers and employes of railroad companies."

The attack made in the Turnipseed case upon the Mississippi statute was that the railroad companies are put into a class to themselves and deprived of the benefit of the general rule of law, which places upon one who sues in tort the burden of not only proving injury but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.

This court, through Justice Lurton, held that the statute was valid; that the law of evidence was full of presumptions; that presumptions of fact were disputable; that the statute did not deny the equal protection of the law or otherwise fail in due process of law because it created a presumption of liability; that its operation only supplied an inference of liability, in the absence of other evidence contradicting such inference; that it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed; and the conclusion was reached that the application of the act to injuries resulting from the running of locomotives and cars was not an arbitrary one but rested upon considerations of public policy, and the Mississippi law was sustained.

The Pierce case, 235 U. S. 380, likewise involved the Mississippi statute, and the validity of that statute was upheld in a memorandum opinion.

In the case of Atchison &c. R. R. Co. vs. Matthews, 174 U. S. p. 96, a Kansas statute was before the court, which provided that, in an action against a railroad for

damage by fire caused by operating the railroad, the plaintiff need only establish the fact that the fire complained of was caused by operating the railroad and the amount of his damages, and that such proof shall be prima facie evidence of negligence on the part of the railroad. This statute was sustained by this Court as not being in conflict with the Fourteenth Amendment to the Federal Constitution.

The state is not only supreme over presumptions, but supreme over rules respecting the burden of proof, as is shown in the case of Hawkins vs. Bleakly, 243 U. S. 210.

In this Hawkins case, an employer's compensation law provided that an employer rejecting the compensation features of the act could not escape liability for personal injuries sustained by an employe because the employe assumed the risk, or because the employe was negligent, or because the injury was the result of intoxication and the like, and that in an action against an employer it would be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut such presumption. Here was a case which went much further than the case at bar in presuming negligence, and which changed the burden of proof. The court, on page 213, said:

> "The same may be said as to the provision that, in an action against an employer who has rejected the act, it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and

of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself, and not conclusive of the rights of the party, does not constitute a denial of due process of law."

LAWS RAISING PRESUMPTIONS OF NEGLIGENCE AGAINST RAILROADS FROM THE FACT OF INJURY HAVE BEEN FREQUENTLY SUSTAINED, AND IT IS FOR THE STATE TO SAY, UNDER ALL SUCH STATUTES, HOW FAR THE BURDEN OF PROOF MAY BE CHANGED AND THE EFFECT OF THE PRESUMPTION. THE ONLY REQUIREMENT UNDER THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION IS THAT THE PRESUMPTION BE NOT UNREASONABLE OR ARBITRARY AND THAT IT SHALL NOT BE CONCLUSIVE.

Statutes providing that the happening of an accident through a defect in the locomotives, cars and machinery or attachments of railroads shall be prima facie evidence of negligence in actions for injuries brought by employes are not unconstitutional. Pennsylvania &c. Co. vs. McCann, 54 Ohio State p. 10, in which case the court say:

> "There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy, over which its legislative department necessarily has authority, limited only by the constitutional guarantees respecting due process of law, vested rights, and the inviolability of contracts."

Statutes making railroads liable for damages resulting from accidents or collisions, unless the railroad shows that the precautions prescribed by statute were performed, are constitutional. Louisville &c. R. R. vs. Burke, 46 Tenn. (6 Coldwell) 45.

In Baltimore R. R. vs. Tripp, 175 Ill. 251, s. c. 51 N. E. 833, a statute of Illinois, which created a presumption of negligence generally against a railroad from fire communicated by its trains to property, was sustained as against the constitutional objection here made, and in that case the court went into an elaborate argument to show that such matters were more peculiarly within the knowledge of the defendant, and it was reasonable to put the burden upon it.

Florida has identically the same statute as Georgia, the Florida statute evidently having been copied from the Georgia statute, as see the Florida General Statutes of 1906, section 3148, the same being also found in Chapter 4071 of the Acts of 1891, the first two sections of which Act are brought into the General Statutes of 1906 as sections 3148 and 3149. This statute has been given effect in several Florida decisions, notably in Atlantic Coast Line R. Co. vs. McCormick, 52 So. Rep. 714; Warfield vs. Hepburn, 57 Southern 618.

In South Carolina, there is also a presumption by law against a railroad of negligence from injury by the operation of a train. In Griffith vs. Atlantic Coast Line, 64 S. E. 222, s. c. 82 S. C. 252, it was said in the third headnote that a railroad company killing stock on the track is subject to a presumption of negligence, and where it assumes the burden of proving due care and offers evidence overcoming the burden, the jury

must rest their verdict not on the presumption alone but on the preponderance of the entire evidence.

In McKittrick vs. Greenville Traction Co., 70 S. E. 414, it was held that the presumption of negligence on the part of the carrier arising from the fact of injury to a passenger through the carrier's instrumentality continues throughout the trial of the case.

THERE CAN BE NO DOUBT BUT THAT A STATE CAN NOT ONLY RAISE THE PRESUMPTION OF NEGLIGENCE FROM AN INJURY FROM THE RUNNING OF A TRAIN, BUT THE STATE CAN ALSO CHANGE THE BURDEN OF PROOF, AND, HAVING RAISED THE PRESUMPTION, CAN PUT THE BURDEN OF PROOF UPON THE DEFENDANT, WHICH ONLY MEANS THAT THE DEFENDANT MUST ESTABLISH ITS FREEDOM FROM NEGLIGENCE BY A PREPONDERANCE OF THE EVIDENCE.

In Minneapolis &c. R. R. vs. State of Minnesota, 193 U. S. 53, it was held that a railway company was not deprived of its property without due process of law by reversing the ordinary rule and putting the burden of proof upon it in a proceeding to require it to establish a railroad station. In that case, the Supreme Court held that the only complaint was that the burden of proof was shifted from the municipality to the railroad, "and therefore the court, in deciding that the railroad company had not overcome the prima facie case arising from the statute, did not decide a Federal question" (this is what the lower court held). The Supreme Court held that it was within the province of

Minnesota to require railroads to provide proper stations, and that the Commission had the power to do so and that it could put the burden on the defendant of showing no necessity. The decision, on page 63, says:

> "To make it prima facie so by statute and to impose the burden of meeting the presumption thence arising, certainly does not amount to an invasion of the rights of property or an unreasonable control of property."

In the case of James Dickinson Co. vs. Harry, 273 U. S. on page 124, this court held:

> "It is well settled that a State may consider proof of one fact presumptive evidence of another, if there is a rational connection between them (citing Hawes vs. Georgia, 258 U. S. 1), and also that it may change the burden of proof (citing authorities)."

The case of Schlesinger vs. Wisconsin, 270 U. S. 230, quoted on page 24 of appellant's brief, made all gifts within six years prior to the death of the testator conclusively presumed to be in contemplation of death. The presumption was declared to be conclusive. As the court on page 239 said, "The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere prima facie presumption of fact."

The case cited by appellant of James Dickinson Farm Co. vs. Harry 273 U. S. 119, already referred to, sustained a Texas statute which provided that, as to a certain class of promise, the fact that it was violated raised a presumption that it was falsely and fraudulently made, and the burden was on the party making

it to show that the promise was made in good faith but that he was prevented from complying with it by the act of God, the public enemy or some equitable reason, and the statute was sustained.

A legislative presumption may be given an artificial value to some extent. Simply because the presumption in some instances may not concide with the facts is no reason why the legislation should not exist. In the case of Yee Hem vs. United States, 268 U. S. on page 184, which involved a statute making possession of opium presumptive evidence to authorize conviction of concealing opium and requiring an explanation of the possession to the satisfaction of the jury, this Court said:

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute."

It will be observed that the act of Congress there sustained required the defendant to explain the possession "to the satisfaction of the jury." This was practically a reversal of the burden of proof. To establish a thing to the satisfaction of the jury certainly must be by the preponderance of the testimony. If the legislature, in enacting a presumption, can go so far as to provide that the reply to it must go so far as to satisfy the jury of its truth, then it certainly has the effect of

evidence, and the presumption is certainly a factor that remains in the case until it is overcome to the satisfaction of the jury.

The foregoing authorities holding that the state is supreme over such questions as reasonable presumptions and burden of proof render it unnecessary to discuss the technical question of whether the railway company can have the burden of proof as to negligence shifted to it, or has merely the burden of the evidence as some of the authorities hold.

As is stated in 22 C. J. 67, there is some confusion over the phrase "burden of proof" and mere "burden of the evidence," the burden of proof referring to the necessity of finally establishing a fact in issue and the burden of evidence representing an ordinary incident of temporarily shifting the burden during the contest. The burden of proof, ordinarily, in a civil case must be made out by a mere preponderance of the evidence. In the case at bar, as appears from the charge of the court, the initial burden was on the plaintiff to show by a preponderance of the testimony the injury by the running of the train, and the burden of course always remained on the plaintiff to show the amount of her damage, but, as to the issues of negligence, the burden was shifted under the Georgia statute when the injury by the running train was shown, and, that the state can shift it and require the defendant to rebut it by a preponderance of the evidence, there can be no doubt. Of course, the railway might put up only one witness who knew all of the facts, and, if he were credible, the railroad would carry the preponderance. As was charged by the judge below, the preponderance did not necessarily rest with the greater number of witnesses,

but it was a matter for the jury to decide, under all of the facts and circumstances of the case, where the greater weight of the evidence was. Certainly, the presumption, if the state legislature so enacts, can as well remain until it is overcome by a preponderance of the evidence, as when any evidence at all is introduced.

IN APPELLANT'S BRIEF IT IS CONTENDED ON PAGE 26 THAT DUE PROCESS OF LAW IS NOT FIXED AND IMMUTABLE BUT CHANGES WITH THE TIMES, THAT THE AUTOMOBILE HAS REVOLUTIONIZED THINGS, THAT A RULE MAY HAVE BEEN VERY WELL FOR HORSE AND BUGGY DAYS BUT IS ABSURD TODAY, AND, ON PAGES 35 AND 36, THAT THE AVERAGE DRIVER OF AN AUTOMOBILE DOES NOT STOP, LOOK AND LISTEN, AND CONSTANTLY VIOLATES ROAD AND SPEED RESTRICTIONS AND RULES AND THAT AUTOMOBILES ARE ENGAGED IN THE CARRIER BUSINESS JUST AS ARE RAILROADS. THESE POSITIONS ANSWERED.

The Turnipseed case, 219 U. S. page 35, was decided in 1910 at a time when automobiles were in pretty general use, so the argument of a change in conditions is without force.

If a statute is constitutional when adopted, as this statute was in 1862, railroads then being unlike any other form of locomotion or transportation, could changing conditions which bring in other rival means of transportation make it unconstitutional? In other

words, can a thing constitutional when adopted become, by changing conditions and scientific discoveries, unconstitutional? This has never yet been held in the history of this country, so far as we are aware.

But there is no such change in conditions as would justify any such contention. The railroad is still the largest and most powerful of all land power-propelled vehicles; it still runs on an iron track.

The automobile uses the place formerly used by the horse. It has crowded the horse out of its highway almost entirely, but the railroad still maintains its own right of way and its own track, and runs as formerly. Not only that, but the advent of the automobile has added a greater element of danger to the operation of railroads over grade crossings, and the reason for the presumption it would seem, if danger be the criterion, is greater.

Courts take judicial cognizance of matters of common observation and of history, and, to some extent, even of current events.

When the Georgia presumption law was enacted in 1862, practically the only power propelled vehicles were locomotives. All other vehicles were horse drawn. There can be no doubt but that even at this day the locomotive and the train are much larger and heavier than other vehicles which carry on the commerce of the country, and that, in crossing our public highways with their tracks, they are heavier and more dangerous than any others which cross that track on the highway. The engine carries fire and steam which are, unless controlled, dangerous elements.

Therefore, the train is much more liable to do injury
coming into contact with some other object than
receive injury. As it is the most powerful and
angerous of machines, and as its operation is entirely
the hands of the employes of the railway company,
would seem reasonable that explanations for in-
ries should come from the railroad.

When a collision occurs between a train and an au-
mobile, it must be that in the great majority of cases
e or the other is at fault. It is clearly within the
risdiction of the state to say which party, prima
cie, is at fault. We deny the claim that in the ma-
rity of instances the automobile is at fault, but, even
this should be the case in the majority of instances,
n not the legislature still raise the presumption?

Is not the consideration that great danger attends
e operation of these trains, and that mere contact
ith other vehicles or with persons will produce in-
ries to such other vehicles or persons, sufficient rea-
n for putting the burden on the railway of explain-
g its diligence? The railway has the means at hand,
rough its employes, of explaining the transaction.

As between citizens who are armed and others who
e not armed, the heavily armed man should be more
rticular. As between those who, in their ordinary
nctioning, are liable to inflict damage as compared
ith those who are not so liable, the former should be
ore particular, and the law should be more exacting
requiring explanations in cases of injury. In other
ords, the one who is more liable to inflict the damage
ould have the burden of explanation, rather than
who is to receive the damage. To put such a burden

on him will make him more particular. He has the means of explanation at hand, and if he was not at fault, he can show it, and hence no harm is done. The one who is to receive the damage has the incentive of protecting himself from hurt and injury to make him particular and careful. He knows that from contact with a train he will be the sufferer. Those operating the train are practically immune from injury. In case of collision or contact with others, the train and its crew are not likely to be the sufferers. Therefore, as their instinct of self-preservation can not be relied on to make them careful, the train crew must be deemed negligent by the law, and the burden put on the railway in the way of a presumption of negligence to explain its exercise of care.

Is not the right in the state absolute, in cases where one of two parties is bound to be at fault, to determine and decide only the prima facie question of who is at fault, and leave the explanation to the one most liable to inflict the injury? Is it not in line with good legislation to put the burden on him who is able to show the facts and who uses the dangerous instrumentality to make the explanation?

REPLY TO APPELLANT'S CONTENTION THAT MISSISSIPPI STATUTE WAS LIMITED TO CASES WHERE EMPLOYES OR PASSENGERS SUED—WE SAY THE STATUTE WAS NOT SO LIMITED—BUT EVEN IF IT WAS SO LIMITED, THERE IS NO DIFFERENCE IN PRINCIPLE BETWEEN RAISING PRESUMPTION IN FAVOR OF PERSON INJURED AT GRADE CROSSING OR ELSEWHERE, WHERE A DUTY WAS OWING TO

HIM, AND AN INJURY TO A PASSENGER OR EMPLOYE

There can be no doubt but that the Mississippi statute sustained in the Turnipseed case, 219 U. S. p. 35, applied as broadly as does the Georgia statute to persons on grade crossings and to all other persons to whom the railroad company owed the duty of some care. We deny, therefore, the soundness of appellant's contention on page 30 of its brief that the Mississippi statute is limited to passengers and employes.

The Mississippi statute has been hereinbefore quoted, and provides that, in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury; and it further provides that this section shall also apply to passengers and employes of railroad companies.

When the Mississippi statute was before this Court in the Turnipseed case, it came up with numerous decisions of the Mississippi courts construing it to apply to persons and property other than passengers and employes. We quote the following cases, all decided previous to the year 1910, when the Turnipseed case was decided, as showing the general application of the statute to injuries other than employes and passengers, to-wit: New Orleans &c. R. R. Co. vs. Bourgois, 66 Miss. p. 3, 5 So. 629, decided in 1889; Roberts vs. Mobile &c. R. R., 74 Miss. 334, 21 So. p. 10, decided in 1896; Hamlin vs. Yazoo &c. Co., 72 Miss. 39, 16 So.

877, decided in 1894. We quote also the following more recent cases as continuing the same construction of the statute as did the cases before 1910, to-wit: New Orleans &c. R. R. vs. Wilkes, 85 Miss. 269; Billingsley vs. Illinois &c. R. R., 100 Miss. 612; and Alabama &c. R. R. vs. Thornhill, 106 Miss. 387, 63 So. 674, which latter was an injury to a man standing on the railroad track at a street intersection, the injury being inflicted by a running train, and the presumption being applied, and in which case most of the Mississippi cases were examined.

We say, therefore, that the Turnipseed decision, in sustaining the Mississippi statute, sustained a statute almost precisely like the Georgia statute, and which applied the presumption certainly to all persons to whom the railroad owed any duty of care.

In the body of the decision, Judge Lurton used the following language:

> "The objection made to this statute is that the railroad companies are thereby put into a class to themselves, and deprived of the benefit of the general rule of law which places upon one who sues in tort the burden of not only proving an injury, but also that the injury was the consequence of some negligence in respect of a duty owed to the plaintiff.
>
> "It is to be primarily observed that the statute is not made applicable to all actions against such companies. Its operation is plainly limited, first, to injuries sustained by passengers or employes of such companies; second, to injuries arising from the actual operation of railway trains or engines; and third, the effect of evidence showing an injury due to the operation of trains or engines is only

'prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury.'

"The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some common-law aspects of the subject, see Cincinnati, N. O. & T. P. R. Co. v. South Fork Coal Co., 1 L. R. A. (N. S.) 533, 71 C. C. A. 316, 139 Fed. 528 et seq.

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases, abound, and the decisions upholding them are numerous. A few of the leading ones are Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; People v. Cannon, 139 N. Y. 32, 36 Am. St. Rep. 668; 34 N. E. 759; Horne v. Memphis & O. R. Co. 1 Coldw. 72; Meadowcroft v. People, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; Com. v. Williams, 6 Gray 1; State v. Thomas, 144 Ala. 77, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17, 40 So. 271, 6 A. & E. Ann. Cas. 744."

In using this language, we do not think the court meant to say that the statute was limited to employes and passengers. The statute provides that the presumption arises "in all actions against railroad companies for damages done to persons or property" by the running of trains, &c. It then provides in a separate sentence: "This section shall also apply to passengers

and employes of railroad companies." The language "all actions" would cover everybody as to whom the railroad could be negligent. Certainly, it could be negligent as to any person anywhere to whom it owed a duty.

The words "This section shall also apply to passengers and employes of railroad companies" were evidently an addition after the original act was drafted, because of some doubt as to whether passengers and employes were covered without this additional language. The word "also" shows that passengers and employes are added to another class already covered by the act.

The language of Judge Lurton in stating that the operation of the statute is limited, first, to injuries sustained by passengers or employes; second, to injuries arising from the actual operation of railroad trains or engines,—was not, in our opinion, intended to limit the right of action to passengers or employes, especially as the Mississippi courts had not so done. The court, in saying, first, the action was limited to injuries sustained by passengers or employes, meant that passengers and employes were covered generally by the act, and secondly, that all other injuries to all other persons were covered by the language making the railway liable for injuries arising from the actual operation of railway trains or engines.

But, even if the Mississippi statute was intended to be limited to passengers and employes, the principle of the decision sustaining that statute would have authorized the application of that statute to any person to whom the railroad owed a duty of care.

Why should the right to raise a presumption be limited to passengers or employes? The railroad sustains numerous relations to other persons, both by contract and—if we may say it—by contact. The railroad company, in crossing grade crossings with its track, comes in touch with the public. The rights of the railroad and the public on grade crossings are said by many decisions to be co-equal, although the railroad (as charged by the judge below in this case on page 166 of the Record) "has the right of way and the traveler must wait until the imminently approaching train, the coming of which he knows, has passed."

A suit by a passenger is not an action on a contract; neither is a suit for an injury to an employe; and hence the claim that there may be some distinction between the right to raise a presumption in favor of employes and passengers, while there is no such right as to other persons to whom the railroad owes an equal duty, is without any sound foundation.

The relation of employer and employe raises only the duty to exercise ordinary care in respect to those things as to which the master owes the duty to the employe. The passenger is owed a degree of extraordinary or utmost care. The violation of this duty of care to either passenger or employe gives rise to an action for tort.

A person on or near a grade crossing is entitled to the exercise of ordinary care. The laws of Georgia require certain signals to be given by the railroad company and certain measures of lookout and other measures of diligence. What is the difference in principle between raising a presumption of negligence in case

of injury to a passenger, to whom extraordinary care is owed, or to a member of the public on a grade crossing, or anywhere else, to whom ordinary care is owed? There can, of course, be no negligence unless there is some duty to observe care, and it would seem reasonable that the presumption of negligence can be raised in any case where there is a duty to exercise care. The distinction, then, made by the appellant in its brief between passengers and employes, on the one hand, and third persons, on the other hand, is a distinction without a difference, and to hold, as does the Turnipseed case, according to appellant's contention, that the presumption can be extended to employes and to passengers, is to hold that it can be extended to shippers whose goods are lost, or to members of the public injured on grade crossings, or to any other case where the railroad company may be negligent. Certainly, the test as to whether such a law can be passed as to railroad companies depends upon the question as to whether, in the case before the court, negligence of the railroad company could exist in the transaction. If so, such negligence can be presumed. It is a mere arbitrary classification to say as to one class of persons to whom a duty of care is owed, the presumption of negligence may be raised, and as to another class to whom the same degree of care is owed, it may not be presumed. The railroad is just as peculiar an individual in its relation to third persons injured by the running of its trains as it is to its passengers and its employes. It can just as well be classified as to injuries to third persons on public crossings and the like as a peculiarly dangerous occupation or business as it can be to its passengers or its employes. Just so the person is injured by the operation of the trains and machinery of

the company, it is sufficient. It is that operation by a railroad of its trains and machinery that differentiates it from other concerns, and this is the basis of classification, and that classification touches the relations of that railroad to every one liable to be injured by the operation of those trains and to whom some duty of care is owed.

We have quoted cases in this Court in which state statutes raised presumptions against railroads where fire was caused by the operation of trains. In such cases, the property owner sustained no relation by contract to the railroad. The property owner was a mere third person who was close enough to the railroad to be injured by the operation of its train, and hence the maxim *sic utere tuo ut alienum non laedas* applied. It was sufficient that the railroad owed a duty to those people owning nearby lands not to injure them, and, on the basis of owing this duty, the state could raise a presumption of negligence from the happening of the injury.

As hereinbefore stated, while the employe may sustain his relation to his employer under a contract, the duty of the employer not to hurt him or to exercise care towards him in the ways specified by law arises from the relation and is not a suit on a contract. The contract is mere matter of inducement creating a relation out of which a duty of ordinary care springs. The action is not brought on the contract but for the breach of duty and the duty is fixed by law.

APPELLANT'S CLAIM THAT GEORGIA STATUTE CREATES A RULE OF LIABILITY AND NOT OF EVIDENCE (APPELLANT'S BRIEF

PAGES 9 AND 10) IS ANSWERED BY THE GEORGIA DECISIONS HEREINBEFORE QUOTED, WHICH EXPRESSLY SAY THAT THE STATUTE IS ONLY A RULE OF EVIDENCE, AND CREATES ONLY A PRIMA FACIE LIABILITY, AND IS ALSO ANSWERED BY THE LANGUAGE OF THIS COURT IN THE TURNIPSEED CASE. ALSO THE STATE CAN CHANGE THE BURDEN OF PROOF.

As to the claim made that the Georgia statute creates a rule of liability and not of evidence, we have already quoted the language of that statute, which makes the defendant liable unless it makes it appear that its agents and servants have exercised all ordinary care and diligence, and provides that "the presumption in all cases is against the company." This language would seem to dispose of the contention that a rule of liability is fixed.

But we have hereinbefore quoted numerous Georgia decisions holding that only a rule of evidence is set out in our presumption statute; that it does not dispense with proper pleadings and proper averments of negligence; that the plaintiff's own evidence may answer the presumption, and that when the presumption is raised, the defendant may rebut it by a mere preponderance of the evidence.

But this same argument was made in the Turnipseed case, and was answered by this court in the following language, which fits the case of the Georgia statute completely, to-wit:

> "We are not impressed with the argument that the supreme court of Mississippi, in construing the

act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury, upon all of the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law.

"The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference."

APPELLANT'S CLAIM THAT THERE WAS ONLY A SHADOW OF PROOF TO SUSTAIN AVERMENTS OF THE PETITION, THAT IT WAS NOT REQUIRED THAT THE NEGLIGENCE SHOULD BE THE CAUSE OF HENDERSON'S DEATH IN ORDER TO WARRANT A RECOVERY, AND THAT THE JURY WERE NOT SO CAUTIONED,—ANSWERED.

On page 12 of appellant's brief, it is contended that there were ten averments of negligence in the petition and no evidence to support seven of them, and that there was only a shadow of proof to sustain the averment of improper maintenance of the track.

We do not think this court will undertake to look into the evidence to decide that question, where the Georgia Court of Appeals has held that there was evidence to sustain the averments of negligence in the petition. This is not a case under the Federal Employer's Liability Act, where this court can examine the evidence to find whether a case of liability exists. This is an attack upon a statute of a state as being unconstitutional.

In reply to the claim that the jury were not cautioned that the averments of negligence in the petition must be the proximate cause of the injury, we quote the following from the charge of the court on page 167 of the Record, to-wit:

> "I charge you that the duty rested upon the railroad company to maintain its crossing in a reasonably safe condition for those who used it in the exercise of ordinary care, and a failure to discharge this duty would constitute negligence on the part of the railroad company; and if such negligence existed, and if such negligence was the *proximate cause* of the death of the plaintiff's husband, she would be entitled to recover, unless by the exercise of ordinary care he, the husband, could have avoided the consequences to himself of such negligence."

Again, on pages 168 and 169, the judge charged:

> "In other words, gentlemen of the jury, before finding for plaintiff, you must find from the evidence that one or more of the acts or omissions, which are in the petition of the plaintiff alleged as negligence, occurred; that such act or omission was a negligent act or omission, *that it resulted in the death of the plaintiff's husband*, and that he

could not have, by the exercise of ordinary care for his own safety, avoided the consequences to himself of such negligence."

Thus, we see that the judge charged the jury clearly that the defendant's negligence must have been the proximate cause of the death.

APPELLANT'S COMPLAINT THAT THE GEORGIA PRESUMPTION IS NOT ONLY ONE OF NEGLIGENCE BUT OF NEGLIGENCE WHICH IS THE PROXIMATE CAUSE OF THE INJURY,—ANSWERED. THE PRESUMPTION OF NEGLIGENCE WOULD DO NO GOOD UNLESS THE NEGLIGENCE SHOULD BE THE PROXIMATE CAUSE OF THE INJURY. A PRESUMPTION OF NEGLIGENCE NOT CAUSING THE INJURY WOULD BE A FUTILE PRESUMPTION. THE DEFENDANT CAN NOT ONLY REBUT THE PRESUMPTION OF NEGLIGENCE BUT CAN REBUT THE PRESUMPTION THAT THAT NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE INJURY. IN DOING ONE, IT ALMOST INEVITABLY DOES THE OTHER, BECAUSE, AS WILL BE HEREINAFTER SHOWN, NEGLIGENCE ALLEGED IN THE PETITION OR SHOWN IN THE TESTIMONY WHICH DOES NOT STAND RELATED TO THE INJURY IS STRICKEN FROM THE PLEADINGS OR THE EVIDENCE AND IS NOT TO BE CONSIDERED.

When the Mississippi statute under consideration in the Turnipseed case, supra, provided that proof of in-

jury inflicted by the running of the cars of the company "shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury," it necessarily meant that the negligence presumed was negligence which contributed to the injury, otherwise, the statute would be wholly irrational. It would be absurd to say that the statute presumed negligence unless the negligence caused the injury.

All through the discussion of the Turnipseed case, this court assumed that there was a presumption not only of negligence, but a presumption that the negligence caused the injury. This court said: "It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation."

To say that the derailment "is due to some negligence," is the same as saying that negligence is the proximate cause of the injury or derailment. It is axiomatic that, unless the negligence is the proximate cause of an injury, it is not actionable. Surely, these statutes presume actionable negligence, and that is all that is involved in the question of proximate cause.

Under another heading in this brief, we will show that in Georgia the question of whether negligence alleged in a petition is the proximate cause can be raised either by a demurrer to the petition, or by objection to evidence at the trial, or can be controlled in the charge of the court. Georgia recognizes the doctrine of proximate cause as fully as any state, and leaves it as an open question in any case where the evidence is pro-

duced. This was illustrated by the charge of the judge in the court below.

THE APPELLANT'S OBJECTION THAT MERE PROOF OF COLLISION AND DAMAGE CREATES PRESUMPTION THAT AVERMENTS OF NEGLIGENCE IN PETITION ARE TRUE, AND CREATES PRESUMPTION OF CAUSAL CONNECTION OF SUCH NEGLIGENCE WITH THE INJURY, AND THAT THE PRESUMPTION IS GIVEN THE FORCE OF SUBSTANTIVE TESTIMONY,—ANSWERED.

As to the last objection stated in the heading made on page 15 of appellant's brief, all presumptions are given the effect of substantive evidence and may be weighed by the jury against actual testimony.

In the case of Hawes vs. Georgia, 258 U. S., p. 1, Georgia's prohibition act made the existence of distilling apparatus prima facie evidence that the person in actual possession of the premises had knowledge of the apparatus. The claim was made that this presumption was unconstitutional, but the court held that the presumption alone would justify a conviction in the absence of an attempt to deny or explain, and we apprehend that a denial or explanation might be so weak that it would avail nothing against the presumption. Hence, the presumption necessarily has the effect of substantive testimony. If it did not have, no evidence would be required against it. It would not be a presumption. Suppose utterly incredible and unbelievable testimony were introduced in response to a presumption such as was raised in the Hawes case.

This court has held in the case of Quock Ting vs. United States, 140 U. S. 417, as follows:

> "There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony."

Here is a case in which a mere presumption would prevail against such unreasonable and incredible testimony.

The Georgia law gives full remedy to the defendant to exclude from the case by special demurrer or by objection to testimony any averments or evidence of negligence which could not be properly considered as negligence, or which could not be properly considered as the proximate cause of the injury.

We have already quoted sections 5538 and 5539 of the Georgia Code, which required all petitions to plainly, fully and distinctly set forth the plaintiff's charge, ground of complaint and demand, and to set the same forth in distinct and orderly paragraphs.

That the presumption has the weight of evidence, and that the fact in dispute remains to be determined on a consideration of all of the evidence, including the presumption, has been held by numerous courts. The fact of the injury by the running of the train here has considerable probative value. The very considerations which moved the legislature to make it presumptive evidence of negligence would have considerable weight with the jury, irrespective of the presumption fixed by statute.

The case of Pacific Portland Cement Co. vs. Reinecke, 158 Pac. 1041 (30 Cal. App. 501), was a suit against the defendant as endorser of certain notes held by the plaintiff. The endorser claimed no consideration for the notes and that he endorsed the same after the notes had been delivered to the plaintiff. The court held that there was a presumption that the note was endorsed for consideration, and that the endorsement was made at the time and place of making the note, and that the burden was on the defendant to prove the contrary. The question was as to whether, after evidence was introduced showing no consideration and that the endorsement was made after the plaintiff had the notes,—as to whether the presumption still had weight. The court said on page 1043 of 158 Pacific Reporter:

> "The presumptive evidence of the time of the making of the indorsement and guaranty and the consideration therefor may be resorted to in aid of the findings, even though it be assumed, as counsel for the defendant contends, that it stands alone and was opposed by direct evidence to the contrary. The general rule that as against a proved fact, or a fact admitted, a disputable presumption has no weight, is subject to the exception that where, as in the present case, an endeavor is made to establish a fact contrary to the presumption, the fact in dispute still remains to be determined upon a consideration of all of the evidence, including the presumption (citing authorities). Therefore, giving all the weight and credence contended for by counsel for the defendant to the evidence adduced in support of the defense made, there still remains a substantial conflict in the evidence which, under the familiar rule, can not be availed of upon appeal to disturb the findings of the trial court."

In Rauer's Law & Collection Co. vs. Harrel, 162 Pacific 125 (32 Cal. App. 45), the action was upon a promissory note, to which evidence of lack of consideration was pleaded, and the question was between the presumption of consideration for the note and the evidence showing no consideration. The lower court had charged that disputable presumptions, while evidence, are the weakest and least satisfactory, and are allowed to stand not against the facts but in lieu of proof of them, and that when the facts are proved contrary to the presumption, no conflict arises, that the presumption is simply overcome and dispelled. The Appellate Court, in dealing with this instruction, on page 136 of 162 Pacific, said:

> "This instruction, in its substance, was taken from Ruth v. Krone, 10 Cal. App. 770, 773, 103 Pac. 960. It was not there said that disputable presumptions are evidence the weakest and the least satisfactory. As a proposition of universal application this is not true. It was pointed out in Hitchcock v. Rooney, 171 Cal. 285, 289, 152 Pac. 913, that disputable presumptions 'have such force as may in some cases outweigh positive evidence against them * * * and sometimes such presumptions as we are here considering require clear and convincing evidence to overcome them.'"

A RAILWAY COMPANY CAN NOT COMPLAIN THAT TO EXTEND PRESUMPTION OF NEGLIGENCE TO AVERMENTS OF PETITION WOULD SUBJECT IT TO FANCIFUL AVERMENTS OF NEGLIGENCE, OR AVERMENTS OF NEGLIGENCE WHICH DO NOT PROXIMATELY CONTRIBUTE TO THE INJURY, OR AVERMENTS OF NEGLIGENCE WHICH

ARE DISCONNECTED WITH THE INJURY; THE DEFENDANT, EXERCISING ITS RIGHT UNDER GEORGIA LAW, COULD STRIKE ANY SUCH AVERMENT FROM THE PETITION, AS GEORGIA LAW AUTHORIZES SPECIAL AND GENERAL DEMURRERS TO PETITIONS IN WHICH AVERMENTS OF NEGLIGENCE ARE UNWARRANTED BY THE NATURE OF THE CASE, OR DO NOT CONSTITUTE THE PROXIMATE CAUSE, OR FOR ANY OTHER REASON SHOULD NOT BE LEGALLY CONSIDERED.

It is the rule in Georgia that negligence, to be the basis of a recovery, must be the proximate cause of an injury. See Platt vs. Southern Photo Material Co., 4 Ga. App. 159; Johnston vs. Enterprise Manufacturing Co., 130 Ga. 143; Shaw vs. Mayor and Council of Macon, 6 Ga. App. 306; Shields vs. Georgia Railway & Electric Co., 1 Ga. App. 172; Burnett vs. Rome Railway & Light Co., 7 Ga. App. 323; Seaboard Air Line Rwy. vs. Smith, 3 Ga. App., page 1.

There being no causal connection between an act of leasing land and homicide by the lessee's servant, there is no case. Compton vs. Seaboard Air Line Rwy., 145 Ga. 255; Central of Georgia Rwy. Co. vs. Price, 106 Ga. 178.

The allegations of a petition must be sufficient to withstand a demurrer on the ground that the negligence alleged is not the proximate cause, and in the case now being quoted the demurrer was overruled but the principle quoted recognized. City of Columbus vs. Anglin, 120 Ga. 785.

The court, on a demurrer, will pass on the question of whether the negligence alleged is the proximate cause. See Bowen vs. Smith Hall Grocery Co., 141 Ga. 721.

Any substantial imperfection in the pleadings in Georgia may be reached by a general demurrer without particularizing. See Douglas, Augusta & Gulf Rwy. Co. vs. Swindle, 2 Ga. App. 550.

The practice of determining issues on a general demurrer where the petition is bad is commendable in Georgia, says the Court of Appeals, for it saves expense and time. See Lewis vs. Amorous et al, 3 Ga. App. 53.

On the hearing of general demurrers to petitions, the pleadings are construed most strongly against the pleader. Krueger et al vs. MacDougald, trustee, 148 Ga. 429.

Unjustified opinions or conclusions of the pleader are not authorized in Georgia, and may be reached by demurrer. See Southern Rwy. Co. vs. Covenia, 100 Ga. 46.

Allegations of fact in a petition in Georgia which are impossible are not admitted by a demurrer. Southern Rwy. Co. vs. Covenia, 100 Ga. 46.

A demurrer in Georgia does not admit an alleged fact which is a physical impossibility. Rome Railway & Light Co. vs. Keel, 3 Ga. App. 769, 773.

Facts which are not issuable are not admitted by a demurrer in Georgia. Williams vs. Stewart, 115 Ga. 864; Smith vs. Usher, 108 Ga. 231.

Facts which are contradicted by legislative acts, or by records of which the court takes judicial notice, are not admitted by demurrer in Georgia. Griffin vs. The Augusta & Knoxville R. R., 72 Ga. 423.

Of course if the petition, upon its face, sets forth no cause of action, a general demurrer reaches the defect. Douglas, Augusta & Gulf Rwy. Co. vs. Swindle, 2 Ga. App. 550; Lewis vs. Amorous, 3 Ga. App. 53; Jarrett vs. A. & W. P. R. R., 83 Ga., p. 347.

Inconsistent allegations in a petition may be reached by special demurrer. Ney & Commins vs. Clere Clothing Co., 5 Ga. App. 327.

Evasiveness in a petition may be reached by a special demurrer. Mayor and Council of Eastman vs. Cameron, 111 Ga., p. 110.

Irrelevant matter may be stricken by special demurrer. Lampkin vs. Garwood, 122 Ga. 407.

It will be seen from the foregoing rulings that there can be no possible merit in any contention that, because the presumption in Georgia extends to the averments in the petition, the defendant will thereby be subjected to fanciful, irrelevant, or immaterial allegations. The defendant, by exercising its rights under the statute, can restrict the averments of negligence to such as are material, relevant and are disclosed to be the proximate cause of the injury.

In the case of Rome Ry. & Light Co. vs. Keel, 3 Ga. App. 769, the court, in the opinion on page 773, used the following language:

"A party will not be permitted to maintain in his pleadings a contradiction of those things of which the court is required to take judicial cognizance. Of the primary physical laws the courts must take notice. 16 Cyc. 854 (8). Therefore the the pleading is demurrable when it sets up a contradiction of these laws. Since a physical impossibility can not exist at all, it can not be admitted even by demurrer. Such an allegation must be treated by the courts just as they would treat an allegation that what is not law is law, i. e., it must be wholly disregarded. Therefore the court erred in not sustaining the general demurrer. Compare McEwen v. Atlanta Ry. Co., 120 Ga. 1008."

As showing that the court is as free in construing the averments of a petition as it would be in considering evidence of acts of negligence brought out in the evidence, we quote the following from the case of Cedartown Cotton Co. vs. Miles, 2 Ga. App., p. 79, our quotation being from the body of the opinion on pages 80 and 81:

"Our Civil Code, section 4960, requires that the plaintiff, in his petition, shall plainly, fully, and distinctly set forth his charge, ground of complaint, and demand. As construed by the courts of this State, this statutory provision requires a higher degree of certainty in pleading than was necessary at common law; but the object to be attained is the same under both systems, to wit, that the pleadings be understood by the party, the jury, and the court. They certainly ought to be so certain and full that the court may look to the allegations of fact and know whether a cause of action is set forth or not. The plaintiff is not required to set forth the evidence, either direct or circumstantial, by which he expects to establish the traversable facts alleged in the declaration, and a

demurrer can not properly be used to compel him to do so; but all the facts necessary to be stated should be set forth plainly, and special demurrer will compel this. In negligence suits, in order that the court may determine from an inspection of the pleading whether a cause of action is set forth, each fact necessary to raise the duty and to show the specific breach thereof, or the specific wrong inflicted, should be plainly and unequivocally stated; and enough of the details of each element of the case should be set out to clearly distinguish the transaction as an actionable one and not to leave it doubtful whether it is or not."

If the evidence in the case discloses the whole transaction, it is necessarily inconsistent with any theory save that shown by the evidence. In such cases averments of the petition not sustained by the evidence are eliminated in the charge of the judge, if such averments do not constitute the direct and proximate cause of the injury. We quote upon this proposition the following language from the case of Shields vs. Georgia Ry. & Electric Co., 1 Ga. App., p. 172, the language we quote being from the body of the opinion on page 174, to-wit:

"It was incumbent upon the plaintiff not only to show that she was injured by the negligence of the defendant, but that such injury was the direct and proximate consequence of the negligence alleged against the defendant; for, to constitute an actionable tort, there must be damage to the plaintiff and negligence by the defendant, causing the injury. Atlanta Consolidated Street Railway Co. v. Owings, 97 Ga. 663; Central Railroad v. Freeman, 75 Ga. 331. In this case, the plaintiff's own evidence utterly negatives the allegations in her amendment as to the cause of her injury."

We contend, therefore, that the claim that extending the Georgia presumption of negligence to the averments of a petition subjects the defendant to illegal or fanciful or unjustifiable charges of negligence is without any foundation. When the Georgia law says that the defendant is presumed to be negligent in the particulars charged in the petition, it means negligence in the legal acceptation of that term. Negligence, when alleged in the petition, is to be considered and looked at just as if the facts described as negligence in the petition had appeared in the evidence. They are not immune from attack as being real averments of negligence. Any criticism can be made upon the averments in the petition, just as if they were in the evidence. The plaintiff, in his petition, may fail to show actionable negligence, just as his evidence may wholly fail to show it, and the court has full control of the subject, notwithstanding the presumption.

The law requiring the plaintiff to expose his claims of negligence in his petition is entirely in the defendant's favor, as it enables the defendant to make any just attack upon those allegations which the law would authorize.

We say, therefore, the appellant can not complain that the presumption subjects it to fanciful or imaginary averments of negligence, or averments of negligence which are not the proximate cause of the injury. The averments are contained in the petition, and the petition can be purged of all such matter. The defendant has a complete remedy by demurrer, as we have shown by the foregoing decisions, to reduce the allegations of negligence to only those which stand related to the injury, and which are real and not fanciful

and which might be held by a jury to be negligence under proper definitions of negligence.

Really, the defendant is complaining of rules made entirely in its favor and for its benefit. Unless the presumption should be restricted to the averments of the petition, it would cover every conceivable and imaginary kind of negligence which the human mind could picture. The defendant would never know when it was through with answering the presumption of negligence. That there might be some limit to the plaintiff's claims is the reason for requiring them to be distinctly and fully stated in the petition, and that the plaintiff might not make fanciful, imaginary or unrelated claims of negligence is the reason why the Georgia law allows the defendants such full liberty by special and general demurrer of purging the petition of all allegations save those which the court can say proximately contributed to the injury and might be held by the jury to be negligence under the proper definitions of that term.

DEFENDANT'S CONTENTION THAT MISSISSIPPI STATUTE CONSTRUED IN TURNIPSEED CASE CREATED A MERE REBUTTABLE INFERENCE WHICH ENDED AS SOON AS PROOF WAS INTRODUCED,—ANSWERED. SUCH ARGUMENT ADMITS THAT THE RAISING OF THE PRESUMPTION OR INFERENCE IS VALID, BUT OBJECTS TO THE EFFECT GIVEN IT IN GEORGIA IN CHANGING THE BURDEN OF PROOF.

Beginning on page 30 of appellant's brief, two Mis-

sissippi cases are cited, and the argument is made that these cases show the Mississippi statute construed in the Turnipseed case created a mere rebuttable inference relating to a matter peculiarly within the railroad's knowledge; that, as soon as proof was introduced, the inference ended, and the presumption could therefore not weigh against actual testimony; that such a rebuttable inference was valid when there was some rational connection between the fact proved and the ultimate fact presumed.

The Mississippi statute created a presumption of negligence from an injury by the running of the trains. The Georgia statute does the same thing.

If it is admitted that the presumption can be raised at the initial stage, that ends the question as to whether there is some rational connection between the fact proved and the ultimate fact presumed. At this stage of the controversy, we are not dealing with the question of how difficult it would be to remove the presumption, but we are dealing with the mere raising of the presumption and not its effect. Therefore, the appellant's argument on page 30 is a practical concession that, to start with, a presumption of negligence can arise from an injury by the running of a train on a railroad. It would seem that no one could doubt that the Turnipseed decision holds this much.

But the appellant claims that the Mississippi statute could be sustained because the courts of that state hold that, as soon as proof is introduced, the inference ends and that the presumption could not be weighed against actual testimony.

If the injury from the running of trains can fairly raise a presumption of negligence, then it should not, as matter of law, be dissipated the instant any testimony is taken against it. The testimony introduced may be utterly incredible on its face. The witness who gives the testimony may be utterly unworthy of belief and impeached by every mode known to the law; and could it be said that, merely because such evidence is introduced that this, as matter of law, would dissolve the presumption? The case would be in a bad fix under such circumstances if the jury did not believe the actual evidence introduced, and could not rely upon the presumption.

Georgia courts do not give any such construction to the presumption. We submit that the effect given to the presumption is a matter for state legislation, so long as the presumption is rebuttable and yields to the testimony, and we submit that requiring the defendant to rebut the presumption by a mere preponderance of the testimony,—a mere tipping of the scales in favor of the defendant,—could not in any way detract from the validity of the presumption.

We submit that the Georgia rule is the only rational rule following out the creation of this presumption, the Georgia rule being that the injury by the operation of the cars raises the presumption but the burden placed upon the defendant to remove the presumption is only a very slight one and can be done by a mere preponderance of the evidence, and this may be even the evidence of the plaintiff himself.

Thus, the Georgia rule having raised the presumption, consistently follows out the proposition by placing

the burden upon the party against whom the presumption is raised to make the evidence preponderate in his favor on that issue. If the defendant introduces some evidence explaining the transaction and covering all of the averments of negligence, and the plaintiff does not reply, then a verdict may even be directed by the judge. If the plaintiff replies to the defendant's evidence upon the subject of negligence, then the question of determining whether there was negligence is for the jury, the burden being upon the defendant to establish its position by a preponderance of the evidence. The plaintiff, of course, had to make out his case originally by a preponderance of the evidence in showing his injury by the running of the train, but, when that fact is shown, the burden shifts. Surely, this is a matter for state regulation.

The construction of the Mississippi statute in the two cases quoted of Columbus, &c. R. R. vs. Fondren, 145 Miss. 679, and Gulf, &c. R. R. vs. Brown, 138 Miss. 39, is slightly different from the construction given the Georgia statute. But, whether the Mississippi court's construction is sound or the Georgia courts' construction is sound, we submit that, in either event, it is a matter for state regulation and is equally valid in both cases.

The only difference between the effect given the statute in Mississippi and in Georgia is that the presumption in Georgia changes the burden of proof. We submit that this is a perfectly permissible difference. It only goes one step further than raising the presumption in the first instance. In Mississippi, after the presumption performs its purpose, the plaintiff is still required to prove all of his averments of negli-

gence. In Georgia, the presumption remains in the case only to the extent of changing the burden of proof, and putting the onus upon the defendant of establishing by a preponderance of the evidence the truth of its defense.

We have already quoted cases from this court holding that not only can the state raise a presumption in a proper case, but that the state has full power to change the burden of proof.

IF THE PRESUMPTION IS VALID, AS THE COURTS OF GEORGIA HAVE HELD IT TO BE, AND AS WE CONTEND THE FOUR DECISIONS OF THE SUPREME COURT OF THE UNITED STATES HELD IT TO BE, THEN RAILROADS CAN BE PROPERLY CLASSIFIED FOR THIS LEGISLATION, AND, IF THEY CAN BE PROPERLY CLASSIFIED, THEY ARE NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

We have already discussed fully the due process of law proposition, and we think that discussion really covers the claim that the railroad is denied the equal protection of the laws.

The only claim as to a denial of equal protection of the laws is summed up on page 37 of defendant's brief in the proposition that unproven averments of negligence are, as a matter of law, dropped from consideration by a jury except in collision cases against railroads.

If the presumption is properly raised against railroads, then they are properly classified to themselves,

and the fact that the same presumption is not raised against others can make no difference. The denial of equal protection of the laws could only exist in the event the classification of railroads for this presumption statute was void, in the first instance, as violating the due process of law clause. Really, the claim that the legislation does not give due process and that the railroad is denied the equal protection of the laws rests upon the same proposition, for, if the railroads are of such a distinctive nature that they can be classified for purposes of this presumption, then they are given the equal protection of the laws if all railroads are treated alike.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 519.—October Term, 1928.

Western & Atlantic Railroad, Appellant, vs. Mrs. Mary E. Henderson and Maryland Casualty Company.	Appeal from the Supreme Court of the State of Georgia.

[May 27, 1929.]

Mr. Justice Butler delivered the opinion of the Court.

Appellee, Mary E. Henderson, sued to recover damages for the death of her husband. He was killed near Tunnel Hill, Georgia, at a grade crossing of a public highway and appellant's railroad, in a collision between a motor truck that he was driving and one of appellant's railway trains. The jury returned a verdict for her and the judgment entered thereon was affirmed in the court of appeals and in the supreme court of the State.

The question presented is whether the due process clause of the Fourteenth Amendment is violated by § 2780 of the Georgia Civil Code. It follows: "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Plaintiff's declaration charges that the collision and death were caused by negligence of defendant and its employees: in leaving the crossing in a dangerous condition; in failing to sound the whistle to give warning or to keep a lookout ahead as the train approached the crossing; in that defendant's employees, after they saw the truck upon the crossing, failed to stop the train but accelerated its speed; in running at a dangerous speed; in not having the train under control when approaching the crossing;

in operating the train by a "practically blind engineer." The answer denied that defendant or any of its employees was guilty of negligence and alleged that deceased came to his death as a result of his own fault.

Plaintiff proved that her husband was killed in the collision. She also offered some evidence of negligent maintenance and a dangerous condition of the crossing. And it necessarily appeared that the train failed to stop in time to avoid the collision. Plaintiff offered no evidence, and there was none in the case, to support her other allegations of negligence. Defendant offered much evidence tending to show that it and its employees exercised due care for the proper maintenance of the track and crossing and in the operation of the train and that neither it nor any employee was guilty of any negligence charged.

The court's charge included the following: "When it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for recovery of damages by reason of such injury, would be entitled to recover. . . . The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualification already given you, that, when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition, and the burden thereupon shifts to the defendant company to show that its employees exercised ordinary care and diligence in such particulars."

Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death; and it makes defendant liable unless it showed due care in respect of every matter alleged against

it. And, by authorizing the jury, in the absence of evidence, to find negligence in the operation of the engine and train, the court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect.*

Appellee insists that § 2780 is valid, and argues that the presumption, being one established by statute, has the effect of evidence and that it is for the jury to decide whether the company's evidence is sufficient to overcome the presumption; that "it should not as a matter of law be dissipated the instant any testimony is taken against it," and that the issue is to be determined on a consideration of all the evidence including the presumption.

Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. *Manley v. Georgia*, — U. S. —, and cases cited.

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause. And the presumption was used to support conflicting allegations of negligence. Plaintiff claimed that the engineer failed to keep a lookout ahead, that he did

*The construction of § 2780 by the trial court is in harmony with that given it in the higher courts of the state. Western & Atlantic R. R. v. Thompson, 38 Ga. App. 599. Western & Atlantic R. R. v. Dobbs, 36 Ga. App. 516. Central of Georgia Ry. Co. v. Barnett, 35 Ga. App. 528. Payne, Agent v. Wells, 28 Ga. App. 29. Central of Georgia Ry. Co. v. Hartley, 25 Ga. App. 110. Georgia Ry. & Electric Co. v. Bailey, 9 Ga. App. 106. Ellenberg v. Southern Ry., 5 Ga. App. 389. And see Georgia Southern & Florida Ry. v. Thornton, 144 Ga. 481

not stop the train after he saw the truck on the crossing, and that his eyesight was so bad that he could not see the truck in time to stop the train.

Appellee relies principally upon *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35. That was an action in a court of Mississippi to recover damages for the death of a section foreman accidentally killed in that State. While engaged about his work he stood by the track to let a train pass; a derailment occurred and a car fell upon him. A statute of the State provided: " . . . . Proof of injury inflicted by the running of the locomotives or cars of such [railroad] company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury". That provision was assailed as arbitrary and in violation of the due process clause of the Fourteenth Amendment. This court held it valid and said (p. 43) "The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. . . . The statute does not . . . fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference." That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & N. R. Co.* v. *Brown*, 138 Miss. 39, 66, *et seq. Columbus & G. Ry. Co.* v. *Fondren*, 145 Miss. 679. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

The presumption raised by § 2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment. *Manley* v. *Georgia, supra. McFarland* v. *American Sugar Co.*, 241 U. S. 79. *Bailey* v. *Alabama*, 219 U. S. 219.

Judgment reversed.